Central Law Journal.

ST. LOUIS, MO., JUNE 4, 1897.

Some time ago we called attention to a decision of the Circuit Court of the City of St. Louis, in which it was held that a bicycle is baggage, which was the first ruling of court on that point in this country. State *ex rel.* Bettis v. Mo. Pac. Ry. Co., 43 Cent. L. J. 363, 377. That case was appealed to the St. Louis Court of Appeals which tribunal has just reversed the case holding that such an article as a bicycle was not contemplated by the statute in reference to baggage of the passenger.

In our last issue, we called attention to the recent decision of Kochersberger v. Executors, in which the Supreme Court of Illinois affirmed the constitutionality of the inheritance tax law of that State. The Supreme Court of Colorado has delivered an opinion in response to the interrogatory of the legislature of that State, in which they declare that an act of that character would be in derogation of the constitution of Colorado. The technical ruling of the court was that a tax on inheritances is not such a tax on property as is contemplated by Const. art. 10, § 3, providing that "all taxes shall be uniform," etc., but is a contribution which the State levies for itself as a condition on which the title to property shall pass on the death of the owner. The court cited Dos P. Col. Inh. Taxes (2d Ed.), § 8; State v. Hamlin (Me.), 30 Atl. Rep. 76; Minot v. Winthrop (Mass.), 38 N. E. Rep. 512; State v. Alston, 94 Tenn. 674, 30 S. W. Rep. 750; U. S. v. Perkins, 163 U. S. 625, 16 S. C. Rep. 1073, and called attention to the Illinois act, and the fact that a *nisi prius* judge of that State had recently declared it to be invalid. At the time of the Colorado decision the Illinois supreme court had not passed upon the question, which they afterwards did reversing the lower court.

Trial judges should take note of the case of Smith v. Sherwood in which the Supreme Court of Wisconsin has very properly decided that the absence of the judge from the court room for a considerable time, during the arguments to the jury, without the consent of the parties, is reversible error. It appears that counsel improved the time during the judge's absence to indulge in numerous acrimonious discussions. Objections were made to some of the statements made by the counsel who was addressing the jury, and in one instance, at least, the judge was sent for to rule upon the objection, which being done, he returned to the adjoining room. It was claimed by the respondent that all such objections were taken down by the reporter, and are contained in the bill of exceptions, but it was claimed by the appellants that objections were made upon which there was no ruling. Of course, the trial judge could not certify to what took place during his absence from the room, and he did not attempt to do so; nor did he state whether he was within hearing, nor whether his absence was with consent of counsel, as claimed by respondent, or not. Herein, says the supreme court, is the vice of the matter. The bill of exceptions is expected to tell the complete story of the trial, from start to finish, and to tell it with absolute correctness. When the trial judge is absent, there is in reality no person or officer who can certify to the appellate court as to what took place during that absence. That court is, and must always remain, in doubt as to the matter; no satisfactory conclusion can be reached from the affidavits of opposing counsel; and thus this period remains a *hiatus* in the case. The presiding judge of a trial court is charged with the duty of trying the case from the opening to the close, and he ought not to abdicate his functions even for half an hour. During such an absence grave errors or abuses of privileges may occur, and the appellate court may be left to the conflicting affidavits of overzealous attorneys or parties in interest to determine what in fact took place. It avails not to say that error must be affirmatively shown. This is true; but, where the trial court has disabled itself from informing the appellate court as to what occurred, how is error to be shown save by affidavit? "We cannot," concludes the Wisconsin court, "but regard this long absence from the bench during an important part of the trial as an error which calls for a new trial. We feel that we should be doing wrong to sanction any such practice. Such a rule, once established, would open the way

to dangerous abuses, and break down one of the most valuable safeguards to litigants." Citing Brownlee v. Hewitt, 1 Mo. App. 360; State v. Claudius, *Id.* 551.

NOTES OF RECENT DECISIONS.

MANDAMUS—STREET RAILWAY — FAILURE TO OPERATE LINES.—The power of court to compel by *mandamus* the operation of street railways was considered by the Supreme Court of Texas in San Antonio St. Ry. Co. v. State, 39 S. W. Rep. 926. It was held that *mandamus* will not lie to compel a street car company to continue to operate its lines on certain streets, where its charter imposes no specific obligations, and the ordinance giving the franchise in the streets merely granted "the privilege" of constructing and maintaining street railways over the lines therein designated. The court thus states the law applicable to the case:

It is a well-settled doctrine that a corporation may be compelled by the writ of *mandamus* to perform a duty imposed by statute. The duty need not be express; it may be implied. Clearly, when it appears by fair implication from the terms of its charter, it is as imperative as if the obligation were expressed. But as to corporations *quasi* public in character —such, for example, as those chartered for the carriage of passengers and freight—there are decisions which hold that they owe certain duties to the public which they may be compelled to perform, although not enjoined by their charters, either in express terms or by specific implication. But we have been unable to discover that any well-defined rule has been laid down by the authorities by which we may determine in every case what implied duties are assumed by such a corporation by the acceptance of its charter. It has been held that in the absence of some direct statutory requirement a railroad company cannot be compelled to establish and maintain a station at a particular point on its line, although it may be shown that the convenience of the public demands it. Northern Pac. R. Co. v. Washington Territory, 142 U. S. 492, 12 Sup. Ct. Rep. 283; People v. New York, L. E. & W. R. Co., 104 N. Y. 58, 9 N. E. Rep. 856. A contrary doctrine seems to have been acted upon in State v. Republican Val. R. Co., 17 Neb. 647, 24 N. W. Rep. 329, and in People v. Chicago & A. R. Co., 130 Ill. 175, 22 N. E. Rep. 857. It is one thing to hold that a company which has accepted a charter authorizing it to construct a line of railroad, with power to condemn property, and has constructed and is maintaining its line, may be compelled to so operate its line as reasonably to meet the necessities of the public; and, as we think, it is quite a different one that a railroad company, by the acceptance of its charter, which simply makes it lawful to construct and maintain a railroad, assumes an obligation to construct it and to maintain its operation so long as its corporate existence may continue. The latter question was presented in the case of York & N. M. R. Co. v. Reg., 1 El. & Bl. 858. There the company had constructed its line in part only. The purpose of the suit was to compel it by the writ of *mandamus* to construct the entire road. In the court of queen's bench there was a judgment for the relators, two of the judges concurring in opinion and one dissenting. This judgment was reversed in the exchequer chamber by the unanimous opinion of the nine judges who sat upon the case. 22 Law J. Q. B. 225. The chief justice, who delivered the opinion of the court upon the hearing of the writ of error, after stating the facts, propounded the questions to be decided as follows: "Upon these facts several points arise: (1) Does the statute of 1849 cast upon the plaintiffs in error a duty to make this railway? (2) If it does not, is there, under the circumstances, a contract between the plaintiffs in error and the landowners, which can be enforced by *mandamus*? (3) And, failing these propositions, does a work, which in its inception is permissive only, become obligatory by part performance?" The second question does not concern us here. The charter in this case did not involve nor did it grant the taking of private property for the public use. After concluding that there was no language in the statute from which it could be inferred that it was the intention of parliament to make it obligatory upon the company by the acceptance of the charter to construct the entire line of railroad, the court, in their opinion, decide the first question as follows: "It seems to us, therefore, that these statutes do not cast upon the plaintiffs in error this duty, either by express words or by implication; that we ought to adhere to the plain meaning of the words used by the legislature, which are permissive only; and that there is no reason, in policy or otherwise, why we should endeavor to pervert them from their natural meaning." Upon the third the court speak as follows: "There remains but one further view of the case to be considered, and of that we have partly disposed in the observations which we have already made. But, inasmuch as Lord Campbell proceeded upon this ground only in the court below, although it was not much relied upon before us in argument, we have, out of respect to his high authority, most carefully examined it, and are of opinion that the *mandamus* cannot be supported upon the ground that the railway company, having exercised some of its powers, and made part of their line, are bound to make the whole railway authorized by their statutes." The opinion throughout bears the marks of the most careful consideration, and is supported, as we think, by argument which cannot be satisfactorily answered.

The authorities upon the precise point are but few. But the question arose in the case of Minnesota v. Southern Minnesota R. Co., 18 Minn. 40 (Gil. 21), and the writ of *mandamus* was refused, because the statute which authorized the construction of the railroad neither in express terms nor by reasonable construction imposed upon the company the specific legal duty of constructing it. The general principle was also affirmed in the case of Northern Pac. R. Co. v. Washington Territory, 142 U. S. 492, 12 S C. Rep. 283. The attempt in that case was to compel a railroad to establish and maintain a station at a point where it was alleged the interest of the public required such station. But upon the point decided in that case the decisions are in conflict. The case of State v. Hartford & N. H. R. Co., 29 Conn. 538, presented a question very like that under consideration. In that case the company was chartered to run its line from its initial point to a point on the tide water. It constructed, and for a while maintained, its road to

the tide water, but, having entered into a contract for a connection with another company, it diverted its line a mile and a half from the water terminus, and ceased to carry passengers to the latter point, though it continued to carry freight. The court held that it could be compelled by *mandamus* to carry both passengers and freight, as required by its charter. But it was contended on behalf of the relators that its charter, by its terms, imposed the duty upon the company to construct and operate its entire line, and especially forbade it to discontinue any part of its line that had been put in operation. On the other hand, counsel for the company maintain that the charter granted the privilege merely, and did not impose a duty. The opinion upon the main question is very brief, and it is impossible to ascertain from it how the court determined the question of the construction of the charter so pointedly presented in the briefs. But in discussing another question in the case the court used this language: "What right have they to covenant with that corporation that they will not run cars to tide water, as the charter provides they shall," etc., from which it may be inferred that they adopted the construction contended for by the counsel for the relators. If the language of the charter is correctly quoted in the brief of counsel, as doubtless it was, we think, that it impliedly made it the duty of the company to continue to operate so much of its line as it should once construct and operate, and that, therefore, the decision is not in conflict with the case previously cited.

We have a similar difficulty with the case of City of Potwin Place v. Topeka Ry. Co., 51 Kan. 609, 33 Pac. Rep. 309. That was an action to compel a street railway company to operate a portion of its line which it had discontinued. The court may have intended to hold broadly that a company which has accepted a mere privilege to build a street railway, and has constructed and operated it, may be compelled by the writ of *mandamus* to continue its operation. The opinion admits of that construction, but the important question whether the mere grant of a privilege imposes a duty is not discussed. The ordinance under which the company acted, however, contained a requirement that the "said railway shall be so operated that a car shall pass any given point each way on the route at least every 20 minutes for 12 hours, and at least once every 30 minutes for 4 hours, during that part of the day the road shall be operated." These are words of command, and may be construed as making it the duty of the company, in case it should construct and operate its road, to continue to operate every part of its line. The opinion, we think, might have been safely placed upon this requirement. But whether such was or was not the intention of the court we cannot say from the opinion. In the case of People v. Albany & V. R. Co., 24 N. Y. 261, the company had completed its entire line, but had ceased to operate a part of it; and a suit was brought in equity to compel a specific performance of that duty. It was held that a specific performance could not be compelled in that form of action, and that the suit was properly dismissed. The judge who wrote the opinion expressed the view that the only remedy was by *quo warranto* to forfeit the charter; but in this the majority of the court did not concur. It is evident, however, that the right to a writ of *mandamus* was not involved in that decision. The legislature, in creating a corporation, has the power to give it an option to do or not to do the acts which it is authorized to perform. On the other hand, it may impose upon the corporation, as the law of its creation, the obligation to exercise to their fullest extent the powers which are granted. In either case the proposed corporators may accept or not; and, in the latter, if they do accept, they may be compelled by *mandamus* to perform the duties so imposed. But to say that in granting a charter to do a public service there is no differennce between making it lawful to do an act, and imposing it as an obligation to perform it, is to say that by reason of the public interest involved language is to have a different construction and effect from what it would have in statutes in general or in private contracts. Expressions may be found in the opinions of courts which countenance that doctrine, but we think there it is based upon an assumption that cannot be maintained upon sound principle. In legislating, the law-making power undertakes to determine what is to the interest of the public, and under the limitations of the constitution it is the sole judge of what will promote the public utility, and must be presumed to be capable of expressing its will in intelligible words. When, therefore, a corporation, whether *quasi* public or purely private, is granted the privilege of doing an act, and there are in its charter no express terms which make it obligatory to do the act, or other words from which by fair construction that intention can be gleaned, we do not see upon what sound principle the duty can be imposed. The allegations in the petition in this case show that the respondent company was chartered merely for the purpose of constructing and operating street railways in the city. The special act merely gave it the right of corporate existence for the purpose indicated. Tugwell v. Ferry Co., 74 Tex. 480, 9 S. W. Rep. 120, and 13 S. W. Rep. 654. The streets were under the control of the city council. The company could do nothing without the consent of the council. The franchise in question was granted by the city council, and the claim is that it is by virtue of that concession, and its acceptance by the company, that the duty arose. But the ordinance (which is quoted above) merely grants "the privilege" of constructing and maintaining street railways over the lines therein designated. No clearer words of mere permission could have been employed. Not only this, but there is in the ordinance neither sentence, phrase, nor word that indicates that it was the intention of the council to make it a condition of the acceptance of its grant that the company should be bound to construct and operate railways over the streets which were therein specified. The company are required to observe all the ordinances of the city then existing, but it is not averred that there was any ordinance in existence at the time of the acceptance of the franchise which imposed that obligation. The following succinct and accurate statement of the law from Redfield on Railways has been often quoted with approval: "Where the charter of a corporation, or the general statute in force and applicable to the subject, imposes a specific duty, either in terms or by fair and reasonable construction and implication, and there is no specific or adequate remedy, the writ of *mandamus* will be awarded." Redf. R. R. p. 678.

THE COURT'S JURISDICTION OF THE RES IN ATTACHMENT AND GARNISHMENT CASES.

To one first contemplating the remedy of attachment it seems fraught with numberless perplexities. It has no analogy to any com-

mon law remedy. The confusion of the student however vanishes when he perceives that the attachment proper is an ancillary proceeding, a proceeding instituted to aid an ordinary personal action then pending, although, perhaps, begun immediately theretofore. The word "attachment" as generally used, contemplates both proceedings. That is to say: Attachment is a dual proceeding. It has a two-fold nature. When begun it is both a personal action and an action against the thing seized by the officer under a writ commanding him so to do. The person action will stand or fall as will be determined by acquiring or failing to acquire personal service upon the defendant. If personal service is had, or what is equivalent, if personal appearance is entered, the court will have power to render a general personal judgment, upon proof of indebtedness. If there be no personal service or appearance, the common law part of the proceeding wholly fails because the court is without jurisdiction of the defendant. This is the fundamental and sole principle governing that part of attachment. There is, however, another part to this two-fold remedy still undetermined. It is the attachment proper, or the proceeding against the property of the defendant, which, although ancillary to the personal and common law part of the remedy of attachment, is nevertheless susceptible of being prosecuted after the other has fallen; and although the other has not fallen, is to be determined independently, and upon principles applicable to it alone. In short, the attachment part proper of this double remedy, is strictly a proceeding *in rem*. It is a proceeding concerning the property alone and will succeed or fail as will be determined by the officer and the writ bringing, or failing to bring, the thing—the *res*—within the power of the court. If the court acquires jurisdiction of the *res* it can, by a special judgment, condemn the thing to, or toward, the satisfaction of the demand established at the trial. If no jurisdiction is acquired of the thing then the court is without authority to condemn it and the attachment will fail. This will be independent of the court's power to render a general personal judgment, as above stated. Upon these simple fundamental principles the great remedy of attachment is based. Garnishment is nothing more than a branch of attachment. It is simply the attachment of intangible property, that is, of property not susceptible of manual seizure and possession by the attaching officer. To simplify the application of the principles regarding the court's acquirement of jurisdiction of the *res*, I will first speak of the law relating to the jurisdiction of the *res* in attachment by direct seizure; second, regarding the jurisdiction of the *res* in garnishment, as affected by the residence of the defendant; and, third, regarding the jurisdiction of the *res* in garnishment, as affected by the domicile of the garnishee, and herein of foreign corporations. The first and second considerations are here given briefly and for the purpose of laying a foundation for the third; because a good text book on attachment and garnishment will treat the subject to such limited extent.

I. *Regarding the Jurisdiction of the Res in Attachment by Direct Seizure.*—It is a fundamental principle of all remedial law, that a court of general jurisdiction has full control over and power to dispose of all property within its territorial limits, when brought before it by due process of law. Upon this principle the action of attachment depends for its efficiency. When properly brought before it, the court will appropriate the property of a debtor to the payment of his debts, when no statute of exemptions prevents, although the person of such debtor and owner be not within the jurisdiction of such court.[1] To bring the property of the debtor within the appropriating power of the court, such property must be duly seized and held under a writ properly issued from a court having competent jurisdiction. The power of the court over specific attached property depends solely upon the seizure of such property within its jurisdiction. This is true whether there has been personal service upon, or appearance of, the debtor or not; the only difference being the court's added power, in the case of personal service or appearance, to render a general personal judgment on which a general execution may issue. In any case there can be no special execution directing the appropriation of special and specific property in attachment, unless that identical property is at the time within the

[1] King v. Vance, 46 Ind. 246; Downer v. Shaw, 22 N. H. 277; Phelps v. Baker, 60 Barb. (N. Y.) 107.

jurisdiction of the court held by proper writ, properly issued and properly executed and returned. The power of the court over the *res* is not dependent upon the presence of the owner, but wholly upon the presence of the *res*. Statutory notice to an absent debtor is sufficient, after the court has possession of the *res*. The power of the court, however, is, in the absence of the debtor, limited to the property attached. When that is exhausted the power of the court is exhausted. The judgment is limited to the property alone. The appropriation of the property satisfies the judgment, no matter what the amount of the debt. No judgment can be rendered for the remainder of the debt in that proceeding, nor can the judgment be used as a basis of an action against the debtor.[2] The presence of the *res* is essential to give the court power over it, and when the *res* alone is present the power of the court ends with the subrogation thereof.

II. *Regarding the jurisdiction of the res in Garnishment, as affected by the Residence of the Defendant.*—Garnishment being merely a species of attachment, the attachment of property not susceptible of manual seizure, the general rules of attachment apply.[3] Garnishment, also, is a proceeding *quasi in rem*. After having obtained sufficient jurisdiction of the defendant by service, appearance or notice, to enter judgment against him, the proceeding against the *res*, the debt, generally depends (like attachment by direct seizure) upon the presence of the thing in court. The debt is considered to be present with him who owes it. True, no possession can be taken of the debt, but, because of the power of the State over its own resident, the court has power to compel payment of the debt when the garnishee is within its jurisdiction.[4] The residence of the principal defendant, then, has comparatively little effect upon the court's jurisdiction of the *res*. His personal presence by service or appearance will give the court jurisdiction to render a general personal judgment, while without personal presence the judgment will be, in effect at least, limited to the value of the *res* within the jurisdiction of the court in the presence of the garnishee.[5] Furthermore, his presence will give the plaintiff a right to recover against the agent of a foreign corporation whenever he, himself, could. The plaintiff is subrogated, then, to the principal defendant's rights and the debt is then payable within that jurisdiction.[6] But it is particularly the presence or absence of the garnishee which effects and affects the jurisdiction of the court to direct the payment of the debt, as we shall see.

III. *Regarding the Jurisdiction of the res in Garnishment, as affected by the Domicile of the Garnishee; and herein of Foreign Corporations.*—It may be stated as a general rule, that wherever the principal defendant in garnishment could himself maintain an action to recover the debt, it may be there enforced by the garnishment; or, in other words, it may be attached as his property; provided the laws of the place authorize it.[7] This is on the theory that the garnishment proceeding is in effect (it is in fact, in Illinois) a suit against the garnishee by his creditor, the principal defendant. The rule is applicable where the garnishee is a resident of the State personally before the court,

[2] Borders v. Murphy, 78 Ill. 81; Judah v. Stephenson, 10 Iowa, 493; Westerveld v. Lewis, 2 M'Lean (U. S.), 511; Cooper v. Reynolds, 10 Wall. (U. S.) 308; Penoyer v. Neff, 95 U. S. 714; Bray v. M'Clury, 55 Mo. 128; M'Cord & Nave Mercantile Co. v. Bettle, 58 Mo. App. 384; Erwin v. Heath, 50 Miss. 795; Myers v. Farrell, 47 Miss. 281; Kilburn v. Woodworth, 5 John. (N. Y.) 37; Maud v. Rhodes, 4 Dana (Ky.), 145; Eagan v. Lumsden, 2 Disney (Ohio), 168; Ingle v. M'Curry, 1 Heisk. (Tenn.) 26; Field v. Dortch, 34 Ark. 399; King v. Vance, 46 Ind. 246; Phelps v. Baker, 60 Barb. (N. Y.) 107; Shaw v. Foster, 22 N. H. 277.

[3] A debt is "property" within the meaning of the garnishment law.

[4] Reimers v. Manf. Co., 70 Fed. Rep. 573, 17 Cir. Ct. App. 228; Cahoon v. Morgan, 38 Vt. 236; Mashass. uck Felt Mill v. Blanding, 17 R. I. 297, 21 Atl. Rep. 538; Fithian v. Railroad Co., 31 Pa. St. 114; Barr v. King, 96 Pa. St. 485; Bank v. Huntington, 129 Mass. 444; Cousens v. Lovejoy, 81 Me. 467; M'Allister v. Insurance Co., 28 Mo. 214; Railroad Co. v. Tyson, 48 Ga. 351; Wyman v. Halstead, 109 U. S. 654.

[5] St. Clair v. Cox, 106 U. S. 350; Newland v. Reilly, 85 Mich. 151; Reimers v. Seatco Manf. Co., 70 Fed. Rep. 573; Wyeth Hardware Co. v. Lang, 127 Mo. 242, 29 S. W. Rep. 1010; Atchison, T. & S. F. Ry. Co. v. Maggard, 6 Col. App. 85, 39 Pac. Rep. 985; Morris v. Union Pac. Ry. Co., 56 Iowa, 135; Carlton v. Washington Ins. Co., 35 N. H. 162.

[6] Cofrode v. Gartner, 79 Mich. 332.

[7] Wyeth Hardware & Manf. Co. v. Lang, 127 Mo. 242, 29 S. W. Rep. 1010; Cross v. Brown (R. I.), 33 Atl. Rep. 147; Harvey v. Railroad Co., 50 Minn. 406; Blake v. Williams, 6 Pick. (Mass.) 285; Lewis v. Bush, 30 Minn. 247; Insurance Co. v. French, 18 How. (U. S.) 404; Railroad Co. v. Harris, 12 Wall. (U. S.) 65; *Ex parte* Schollenberger, 96 U. S. 369; Railroad Co. v. Koontz, 104 U. S. 5, 10. If the defendant be dead, letters of administration must be taken out for purpose of bringing the action. Bowdon v. Holland, 10 Cush. (Mass.) 17.

because of the well known principle that every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory, and upon the necessary assumption in attachment cases that property has a location, a *situs*, entirely distinct from the owner's domicile.[8] The rule is not, however, always applicable and is sometimes misapplied, because of another principle which is a sequence of the one stated. It is, that no State can exercise direct jurisdiction and authority over persons and property outside of its territorial limits.[9] This latter rule renders a court powerless where the principal defendant and garnishee are both outside of the State. The court has no jurisdiction of the *res*. There is no property within the State and the courts of the State and the courts of the United States for such State are without jurisdiction to proceed in attachment. No jurisdiction is acquired unless the debt is either actually or constructively within the jurisdiction.[10] Notwithstanding the presence of the debt, the *situs* is with a creditor for the purpose of taxation, the presence—*situs*—of the debt for the purpose of garnishment (as well as for the purpose of administration) is with the one who owes it—the garnishee. That is because the title is in the creditor, while the possession is in the debtor (garnishee). A debt is therefore ambulatory and follows the person of the debtor and the *lex rei sitæ* regulates the legal remedy.[11] Garnishment can only be maintained where the court can get jurisdiction of the garnishee in whose presence the debt is. The obligation is in him and can only be enforced for the benefit of the plaintiff in a forum which can reach him, regardless of where the evidence of the debt may be.[12] And no substituted service is authorized to be made upon the principal defendant until the court has acquired jurisdiction of the *res* —*i. e.*, the person of the garnishee, where the *res* is a debt.[13] The application of this principle, though simple, has been much confused when it has been sought to be applied to corporations as garnishees. A corporation has its domicile at all times in the State where it was created, and cannot be garnished in another State for debts owing by it to a home creditor so as to make it effectual against such creditor in the absence of jurisdiction acquired over the person of such creditor.[14] Furthermore, the fact that a corporation has an agent in a State does not carry the corporation into that State and

[8] Atchison, T. & S. F. Ry. Co. v. Maggard, 6 Col. App. 85, 39 Pac. Rep. 985; Pomeroy v. Rand M'N. & Co., 157 Ill. 176, 41 N. E. Rep. 636; Green v. Van Buskirk, 7 Wall. (U. S.) 139; Almy v. Wolcott, 13 Mass. 73; Cooper v. Ingraham, 45 Miss. 198; Bank of Mo. v. Bredow, 31 Mo. 523; Parker v. Scott, 64 N. Car. 118; Illinois Cent. Ry. Co. v. Brooks, 90 Tenn. 161, 16 S. W. Rep. 77; Harrell v. Mexico Cattle Co., 73 Tex. 612, 11 S. W. Rep. 863; Mathews v. Smith, 13 Neb. 178; Clark v. Chapman, 45 Ga. 486; Lyon v. Russell, 72 Me. 519.

[9] Atchison, T. & S. F. Ry. Co. v. Maggard, 6 Col. App. 85, 39 Pac. Rep. 985; Story on Confl. of Laws, ch. 2, § 539; Wheat. Int. Law, Part 2, ch. 2.

[10] Douglas v. Insurance Co., 138 N. Y. 209; Central Trust Co., of N. Y. v. Chattanooga Ry. Co., 68 Fed. Rep. 685; Drake v. Railroad Co., 69 Mich. 168; Craig v. Gunn, 67 Vt. 92, 30 Atl. Rep. 860; Towle v. Wilder, 57 Vt. 622. This rule applies to wages due from a corporation of another State to its employee a resident of such other State, and it is not affected by the fact alone that such corporation is subject to suit by process on its own local agents. The State where the services were rendered and in which the employer and employee reside is the *situs* of the chose in action for wages, and the creditor of the employee who would reach the fund by garnishment must proceed in that State (Central Trust Co. v. Chattanooga Ry. Co. 68 Fed. Rep. 680; Atchison, T. & S. F. Ry. Co. v. Maggard, 6 Col. App. 85, 39 Pac. Rep. 895), unless such corporation has voluntarily consented to be considered as a resident of the State where its agent is doing business. Compare, Mooney v. Buford & George Manuf. Co., 72 Fed. Rep. 32, which see below.

[11] Neufelder v. Insurance Co. (Wash.), 33 Pac. Rep. 870; Central Trust Co. v. Chattanooga Ry. Co., 68 Fed. Rep. 685; Blanchard v. Russell, 13 Mass. 5; Tappan v. Bank, 19 Wall. (U. S.) 490; Kirkland v. Hotchkiss, 100 U. S. 491; State Tax on Foreign-held-Bonds, 15 Wall. (U. S.) 300; Mayor of Gallatin v. Alexander, 10 Lea (Tenn.), 475; Cannon v. Apperson, 14 Lea (Tenn.), 555; Douglas v. Insurance Co., 138 N. Y. 209; Insurance Co. v. Hettler, 37 Neb. 849; Railway Co. v. Dooley, 78 Ala. 524; Railway Co. v. Chumley, 92 Ala. 317; Railway Co. v. Sharritt, 43 Kan. 375, 23 Pac. Rep. 430; Railway Co. v. Smith (Miss.), 12 South. Rep. 461; Atchison, T. & S. F. Ry. Co. v. Maggard, 6 Colo. App. 85.

[12] Mooney v. Buford & George Manuf. Co., 72 Fed. Rep. 32; Wyman v. Halstead, 109 U. S. 654; Cahoon v. Morgan, 38 Vt. 236.

[13] Central Trust Co. v. Chattanooga Ry. Co., 68 Fed. Rep. 685.

[14] Douglas v. Insurance Co., 139 N. Y. 209; Plimpton v. Bigelow, 93 N. Y. 593; Gibbs v. Insurance Co., 63 N. Y. 114; Railway Co. v. Dooley, 78 Ala. 524; Railway Co. v. Maltby, 34 Kan. 125; Wright v. Railroad Co., 19 Neb. 175; Railroad Co. v. Sharritt, 43 Kan. 375, 23 Pac. Rep. 430; Keating v. Refrigerator Co., 32 Mo. App. 293; Fielder v. Jessup, 24 Mo. App. 91; Lovejoy v. Albee, 33 Me. 414; Sawyer v. Thompson, 24 N. H. 510; Tingley v. Bateman, 10 Mass. 343; Baylies v. Houghton, 15 Vt. 626; Everett v. Conn. Mut. Ins. Co., 4 Colo. App. 509; Renier v. Hulbert, 81 Wis. 24; Pierce v. Railway Co., 36 Wis. 283; Nye v. Liscombe, 21 Pick. (Mass.) 263; Lawrence v. Smith, 46 N. H. 533; Green v. Bank, 25 Conn. 452.

does not, of itself, affect the locality of a debt owing to a resident of the State where the corporation is domiciled, or residing in another State than that in which the proceeding is brought, the contract having been made and being payable there.[15] The corporation remains a resident of the State where it is inporated,[16] and is not present in every State where it may happen to have an agent for the transaction of local business. If the presence of the agent were the presence of the corporation generally then the debt would also be present at the same time in each and every such jurisdiction. This is preposterous, for a credit can no more have a multiplied existence than an article of tangible personal property. The general application of any other theory would give rise to the most embarrassing conflict of jurisdiction and subject creditors of domestic corporations to great prejudice.[17] It is only when the corporation has voluntarily consented, agreeable to the laws of the State, to become subject to process in that State "with like effect" as if it had been incorporated therein, that garnishment may be maintained in the absence of the principal defendant when the domicile of the garnishee is also in another State. In such a case there is no disagreement with the general rule, for the garnishee is in effect personally present to the same extent as though domiciled in the State and the court has full jurisdiction of the *res*—the debt—regardless of the absence of the principal defendant.[18] The reason for the rule is good and its application easy. In all cases where the corporation garnished is a domestic corporation, *i. e.*, chartered in the State—or where it has consented to be so considered, the court acquires jurisdiction by the general principle that courts have jurisdiction over person and property within their territorial limits. But where the principal defendant is not personally before the court, and the garnishee is a foreign corporation and has not consented to be treated as present "with like effect" as if incorporated in that State, the court no more acquires jurisdiction of the debt owing from such corporation than it would acquire jurisdiction of a debt owing from an individual not served within the territorial jurisdiction of the court. Such is, to a certainty, the law regarding the court's jurisdiction of the *res* in attachment and garnishment cases, as determined by the latest and most logical decisions; but though the rules be logical and simple their misapplication leads to an amount of litigation that is scarcely equalled in any other legal remedy.

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[15] Douglas v. Insurance Co., 139 N. Y. 209; Mooney v. Buford & George Manuf. Co., 72 Fed. Rep. 32.

[16] Gibbs v. Insurance Co., 63 N. Y. 114; Plimpton v. Bigelow, 93 N. Y. 593.

[17] Douglass v. Insurance Co., 139 N. Y. 209.

[18] Mooney v. Buford & George Manuf. Co., 72 Fed. Rep. 32.

SALE OR BAILMENT.

NORWEGIAN PLOW CO. v. CLARK.

Supreme Court of Iowa, April 10, 1897.

A contract between manufacturer and dealer provided that goods shipped to the latter should remain the property of the former till sold, the money and notes received on sales to be held by the consignee as collateral security to his debt to the consignor, to whom the sales notes were to be made payable; that the consignee should sell the goods at a reasonable profit, within a specified time, advance at time of shipment one-third the price in cash, and give his notes for the balance, or, at his option, execute his notes for full price; that the proceeds of sales should be applied to the consignee's account, but that he might take up any of his notes, either by cash or by sale notes, on such terms as might be agreed on, the sale notes to be guarantied by him; that goods remaining at end of season, and accepted by the consignor, should be credited on the consignee's account; that the latter could appropriate proceeds after the consignor was fully paid; that no goods should be returned without the consignor's order; that said consignor carried no goods in hands of customers; and that the consignee must look to carrier for all loss or damage. Subsequent correspondence showed that the consignor recognized the consignee as his debtor. Held not a contract of bailment, but of sale.

DEEMER, J.: Appellee is a wholesale dealer in farm machinery at the city of Dubuque, and, at the time of the happening of the matters in controversy, Bush was a retail dealer in the same line of goods at Mason City. Bush had been buying goods of the appellee in the regular way for some 15 years prior to 1893. In this last-named year he became insolvent, and a new arrangement was made between the parties, by written contract, to which reference will hereafter be made. The notes in controversy were taken by Bush during the year 1894. No written contract was made for that year, but the understanding was (to quote the language of appellee's agent) "that the same deal we had in 1893 should prevail in 1894." Bush also says that this was the arrangement. The written contract consists of two parts, the material parts of which are as follows: It first recites that appellee gives Bush

the privilege of selling goods to the trade tributary to Mason City, and Bush agrees to do all the business pertaining to the sale of the goods, pay freight and charges against them, keep the same insured, pay taxes, keep them well housed and in good order, free of charge, and until sold or disposed of by order of first party. The next provision is an agreement on the part of Bush to sell the appellee's goods conclusively at a reasonable profit, and with an authorized warranty, making purchasers' obligations mature not later than December 1st of the year of sale. This is followed by a provision that Bush is to obtain settlement for all goods at time of delivery to purchasers, either by cash or notes, all notes to be payable to appellee, and to be secured so as to make them bankable; and, at any settlement between the parties, Bush was to furnish to appellee a full account of sales, and to turn over to appellee all cash, notes, or other proceeds of sale. Bush was not to retain or use any of the proceeds of the sales until appellee was paid in full. This is followed by a provision whereby Bush guarantied the sale of all goods shipped him on his order under the contract by the time specified in the annexed order, and, to insure the fulfillment of the contract, he further agreed to advance, at the time of such shipments, one-third the agreed price thereof in cash, and to execute his notes for the balance, or, at his option, as an evidence of the indebtedness and of the price agreed upon, to execute his notes for the full value of the goods on the terms provided in an attached price list. And all the proceeds of sales and collections of purchaser's notes, less expense of collecting the same, were to be applied in payment of the unpaid balance of Bush's notes and accounts. It was further provided that Bush might take up his notes at any time by cash or farmers' notes taken for goods sold, and on such terms as the parties might agree upon, and with a guaranty thereafter provided. Bush also guarantied the collection of all purchasers' notes and all renewals thereof, and a form of guaranty waiving demand is embodied in the contract. It was further agreed that appellee should have at all times the entire and exclusive control of all accounts, contracts, and other property accruing out of the sale of the goods. Bush further agreed to hold all goods remaining on hand at the end of the season free of charge, but, if appellee should order their delivery, then Bush was to place same on board cars, and was entitled to a credit for their value upon his account. A further provision was to the effect that the goods should be held by Bush on special storage, and deposited as the property of appellee until converted into money or notes, as by the contract provided; and, when so converted, the money and notes were to be held on special deposit for appellee, as collateral security to any indebtedness of Bush, either on notes given by him or guarantied under the terms of the contract, and surrendered on order of appellee. A further condition was to the effect that Bush was to settle for all goods at such prices and on such terms as were stipulated in the order attached, which order was made a part of the contract, and all orders for goods were made subject to the approval of appellee. The order attached to this contract, and made a part of it by express reference, was in effect a request of appellee to manufacture and ship to Bush certain goods, for which he agreed, on shipment or demand, to give notes, payable at dates, and on conditions stated therein. Notes given for plows and other goods for spring trade were to mature July 1st, and those given for goods sold for fall trade were to become due November 15th. This provision was followed by certain discounts allowed for cash. By the next paragraph, Bush agreed to receive and keep the goods well stored and insured, and recapitulated certain other collateral agreements contained in the first paper, and further says that all goods on hand and the proceeds of sale of goods shipped shall be held for the exclusive use and benefit of appellee for their security until all Bush's obligations arising under the contract are completely fulfilled. It was also agreed that all future orders should be subject to the terms and prices contained in the order, unless otherwise expressly agreed in writing. Appellee agreed to pay all expenses of collection of notes. This order also contained these provisions: "No consignments made. No goods carried in the hands of customers. Consignees must look to carriers for all loss or damage to goods where same are shipped and receipted for in good order." This was followed by a long price list of the different kinds of goods manufactured by appellee. The contract proper was signed by both parties, and the order by Bush alone. Bush ordered many goods during the years 1893 and 1894, and in each instance an invoice was sent him, showing ordinary sale of the goods. During the year 1894, and after appellee had shipped many goods to Bush on orders similar to the one quoted, it wrote him many letters, and from them we extract the following statements: "Your favor of * * * draft for $60.06 received, for which please accept thanks." "We have a good deal of money to raise Monday. Rush all you can. Send here by Monday morning. We will allow you 5 per cent. discount." "Received from John Bush the following notes, to be held as collateral to his account." "Received of John Bush the above-named notes to be held by us, and any payments on same to be credited to his account. When settlement is complete, any notes remaining in our hands to be returned to John Bush." In November, 1893, appellee rendered a statement to Bush, showing total charges and credits. Among the credits was this item: "Farmers' notes as collateral, $437.50." This account also showed a balance due from Bush of $262.50. The oral testimony shows that Bush gave no notes for the goods shipped him under the contract above set out, and that he paid appellee for the goods as they were sold by him, and that the invoices to which

we have referred were upon the common form used by the company, whether they sold the goods direct, or shipped them on what are denominated "agency contracts." Appellee's agent, who made the contract, also testified that they made such instruments as the one referred to as security, and that they did not make them with people who were considered good.

This is, in substance, all the evidence upon which the case was decided, and appellant insists that the court erred in construing the contract to be one of bailment, and not of sale. This presents the principal question in the case, and to this claim we now turn our attention. It may be that the parties intended this to be a contract of agency, and not of sale; but their agreements, whatever the intention, culminated in the written instruments to which we have referred, and their respective rights and liabilities must be determined by reference to this contract, construed in the light of the surrounding circumstances. Appellant says that the rule by which to determine whether a contract is one of bailment or sale is this: "That if the identical thing is to be returned, even in an altered form, it is a bailment; but if the receiver is at liberty to return another thing, whether in the same or a different form, or to pay money at his option, it is a sale." This is the rule sometimes given in the books. *Vide* Brown, Bailm. p. 3; Benj. Sales (6th Ed.), p. 5; Wright v. Barnard, 89 Iowa, 166, 56 N. W. Rep. 424. And the Supreme Court of Illinois adopted this test in a case quite like the one at bar. See Chickering v. Bastress, 130 Ill. 206, 22 N. E. Rep. 542. Now, while this test is no doubt a good one in a certain class of cases, yet it is by no means certain in a case of this character. If this were the rule, it would do away with all that character of bailments known as "consignments for sale," because there is no obligation in such a case to return the specific article, but only the value thereof in money after a sale is made by the factor or consignee, or, in case no sale is made, then to restore the specific article. To arrive at a proper solution of the question, we must determine whether this contract created a mere bailment for the purpose of sale, or a sale on time, or with reservation of title until paid for, and therefore void, under our recording act (section 1922 of Code of 1873). If the contract is one of pure agency, providing for a consignment of goods to be paid for at a fixed price out of the proceeds of the goods when sold, this is a bailment for sale, and the title remained in the appellee until the goods were sold to a *bona fide* purchaser for value. But if the contract is in form an agency contract, but really one of sale, made so for the purpose of evading the statute, or if it is in reality a contract of sale by which the consignee became in fact a purchaser, and was liable for the goods when sold as the principal debtor, then the contract is one of sale. Benj. Sales (6th Ed.), p. 7; 3 Am. & Eng. Enc. Law, 340. One of the principal tests by which to determine this question is, was there a binding promise on the part of the consignee to pay for the goods? If there was such promise, the contract is ordinarily held to be one of sale, and not of bailment. Bently v. Snyder (Iowa), 69 N. W. Rep. 1023.

Great difficulty arises in applying these rules and, as a consequence, there are numerous and conflicting decisions on the subject. We will not undertake to review any considerable number of them, but will content ourselves with an effort to apply the principles above announced to the facts disclosed by this record. The contract, instead of being plain and simple, is long, indefinite, and somewhat obscure. It gives Bush the privilege of selling appellee's goods in a certain territory, provides that he shall obtain settlement for all goods at time of delivery, either in cash or notes (notes to be payable to appellee), and that he shall turn over all cash and notes received by him to appellee. None of the proceeds of sales could rightfully be used by Bush until appellee was paid in full. Appellee was to have full control of accounts, contracts, etc., accruing out of sales, and goods were to remain the property of appellee until converted into money or notes, as provided by the contract; and the money and notes taken for the goods were to be held on special deposit by appellee as collateral security to any indebtedness of Bush, either on notes given or guarantied by him. Bush was to sell the goods at a reasonable profit, and subject to an unauthorized warranty, and make all purchasers' payments for the same due, not later than December 1st of the year of sale. Thus far the contract is purely one of consignment for sale. But, in addition to these provisions, we find that Bush guarantied the sale of all goods shipped him on his order by the time therein specified, and, to insure the fulfillment of this contract, agreed to advance, at the time of shipment, one-third of the agreed price thereof in cash, and to execute his notes for the balance, or at his option, as an evidence of the indebtedness and of the price agreed upon, to execute his notes for the full value thereof, on terms provided in the order and price list before referred to. It is true that all proceeds of sale and collections of purchasers' notes, less expenses of collection, were to be applied in payment of unpaid balance due on the notes or unsettled accounts of Bush; but it was also provided that Bush might take up any of his notes, either by cash or by notes taken for machinery sold, but the taking of the notes in lieu of cash was to be upon such terms as might be agreed upon, and not as of right, and then only with an absolute guaranty on the part of Bush. The machinery remaining on hand at the end of the season, and accepted by appellee, was to be credited on Bush's account. The money and notes taken by Bush were to be held on special deposit as collateral security for appellee to any indebtedness of Bush on either the original or guarantied notes. Bush further agreed to settle for all goods at such prices and on such terms as are stipulated in the

order which was made a part of the contract. In the order for the goods, Bush agreed to give his notes, payable at the dates and on the conditions therein stated; and this order further stated that the proceeds of all goods shipped should be held for the exclusive use and benefit of appellee as security, until all of Bush's obligations arising under the contract were fully complied with. Another condition of the order was the following: "No consignments made. No goods carried in the hands of customers. Consignee must look to carriers for all loss or damage to goods." Was there a promise on the part of Bush to pay for the goods shipped? It seems very clear to us that there was. It is true that this promise might be fulfilled by turning over cash or notes taken for machinery sold by him. But mutual agreement of the parties was necessary to a liquidation of Bush's obligations by these farmers' notes. The purchase price of the machinery was all charged to Bush, for it appears that if any remained at the end of the season, which appellee elected to receive back, Bush was to have credit for the invoice price thereof. The primary indebtedness was that of Bush, for the contract expressly says that the cash and notes received by him from sales of the goods were to be held as collateral security to his indebtedness to the company. Corroborative of this is the statement in the order that appellee made no consignments, carried no goods in the hands of customers, and that consignees should look to carriers for all losses or damage to goods. Again, the order says, "no goods to be returned without our order." By the terms of the contract, Bush had the right to sell the goods at his own price, provided a reasonable profit was realized, and to appropriate to his own use any of the money or notes received by him for the goods after he had paid his obligations to the appellee. The only rational conclusion to be drawn from these provisions, it seems to us, is that Bush purchased the goods upon credit, upon condition that he would devote the entire proceeds of all sales to the payment of the indebtedness created by the purchase. The invoices used by the appellee point strongly in this direction, and the further fact that appellee recognized Bush as its debtor in all its correspondence subsequent to themaking of the contract is almost conclusive of the subject. The mere fact that the parties called the payment of the execution of the notes required of Bush an advance is not of controlling importance. This term was evidently used to disguise the real transaction. Devested of all superfluities, the contract required Bush to become a purchaser of such goods as he might order, and the fact that it contains other undertakings does not change its character.

One clause of this contract is almost identical with that construed in the case of Plow Co. v. Braden, 71 Iowa, 141, 32 N. W. Rep. 247. We held the contract in that case to be one of conditional sale, and not a bailment. See, also, Wright v. Barnard, *supra;* Chickering v. Bastress, 130 Ill. 206, 22 N. E. Rep. 542; Machine Co. v. Holcomb, 40 Iowa, 33; Manufacturing Co. v. Johnson, 97 Mich. 531, 56 N. W. Rep. 982; Mack v. Tobacco Co. (Neb.), 67 N. W. Rep. 174; Kellam v. Brown, 112 N. C. 451, 17 S. E. Rep. 416; Manufacturing Co. v. Lyons, 153 Ill. 427, 38 N. E. Rep, 661. Appellee relies upon the case of Budlong v. Cottrell, 64 Iowa, 234, 20 N. W. Rep. 169; Conable v. Lynch, 45 Iowa, 84, and Bayliss v. Davis, 47 Iowa, 340. The first case is clearly not in point. The theory of the contract in that case was that it was to be fully executed by the parties at substantially one time, and that, until fully executed, neither the title to the property nor any right or interest therein passed to the consignee. Neither is the Conable Case authority for a doctrine contrary to that here announced. The controlling thought in that case was that the consignee should continue to sell the machines and property until August 1, 1875, as the agent of the plaintiff, and any that remained unsold at that date he was to take and pay for in notes or other valuable consideration. The consignee delivered some of the goods to a stranger in payment of his own debt before the 1st of August, and, in a contest between the consignor and the creditor, it was held that the consignor was entitled to recover, for the plain reason that at the time of the sale Berry was acting as agent for the consignor, and could not dispose of the property in payment of his own debts. The Bayliss Case is more nearly in point, but in that case the fact that the consignee advanced one-third of the value of the goods to the consignor, and gave his note for the balance, was not regarded as controlling, for the reason that he was to be repaid the advances from cash payments made by farmers to whom he might sell machines, and his notes were to be taken up and canceled by farmers' notes taken by him. It further appears that these farmers' notes were held at all times by the consignee as agent for his principal, and not as collateral security to an indebtedness owing by him to the consignor. The evidence adduced upon the trial was not before us in that case, and the decision was based solely upon the written contract. There are these further differences between that case and the one at bar: Thomas Stinson was expressly appointed agent, and his commission for the sale of machines was fixed. He was to remit proceeds of sales as fast as received, "after deducting advances specified in contract;" and the notes given by him were to be taken up by exchanging "therefor farmers' notes taken for said machines." In this case Bush's commission was not fixed. He was not required to remit proceeds of sales as fast as received, nor was he authorized to withhold cash to meet the advances made by him, nor could he, as a matter of right, exchange farmers' notes for his own. He held the notes and cash received on special deposit for the appellee as collateral security to his indebtedness to the company on his notes. In one case

the consignee had the absolute right to exchange farmers' notes for his own, and to pay his obligation (if such it can be called) from this particular fund. Moreover, this fund belonged at all times to the consignor. In the other he had no such right, and he held the fund as collateral security to the main indebtedness of the consignee for the goods. He did not have the right of exchange, and it was optional with the consignor as to whether it would accept farmers' notes in liquidation of the principal obligation. The consignee could not insist upon the payment of his obligation from the particular fund, and he was at liberty to pay his indebtedness at any time after it was due, and retain the money and notes received by him from sales of machinery. The cases are clearly distinguishable, and the case at bar is more nearly like that of Plow Co. v. Braden, *supra*, than any that have heretofore been decided by this court. Appellee says that the orders made by Bush should not be considered in construing the contract. To this proposition we cannot agree. The papers were made at the same time, and evidently as a part of one transaction. Moreover, each of the papers specifically refers to the other; and in the contract it is expressly provided that the order is a part thereof.

It is further suggested in argument that as Bush made no advance payments upon the machinery, and did not give the notes called for by the contract, he should not be held to be a purchaser. To this it may be said that, if he received the goods under the contract, he became the purchaser thereof, and the mere failure of the company to exact compliance with the contract by Bush would not change the nature of the transaction. Warder, Mitchell & Co. v. Hoover & Co., 51 Iowa, 491, 1 N. W. Rep. 795. The evidence affirmatively shows that appellee regarded Bush as its debtor for the goods, for it sent him statements of account, in which it charged him with the machines, and credited him with cash, and with certain notes received, and also made mention that it held certain of them as collateral security to his account. If the contract is to be wholly disregarded, then it is clear from the evidence adduced that appellee is not entitled to recover. Bush said on the witness stand that, when he received goods from appellee, he knew the prices he was to pay for them, and that, when he sold them, he paid appellee a certain price agreed upon beforehand. If this be true, then the title passed as soon as he sold the goods to a purchaser, and the company held his obligation to pay for them at certain fixed prices. The notes attached in this case were for goods sold, and it is certain that the title to the goods passed to the purchaser. Bush was obligated to pay appellee for these goods so sold at certain fixed prices, and held the notes as his own, or, to give the case the brightest aspect for appellee, held the notes as collateral security for appellee to secure his indebtedness. If it is to be said appellee is entitled to the notes because of a lien thereon in virtue of the clause of the contract providing that they should be held as collateral to Bush's indebtedness, a ready answer is that appellee alleged in its petition that it was the absolute and unqualified owner of the notes, and that Bush held them simply as agent. It could not recover on such a petition by evidence tending to show a qualified interest. Kern v. Wilson, 73 Iowa, 490, 35 N. W. Rep. 594; Woolsey v. Williams, 34 Iowa, 413.

Appellee insists that, as the case was tried to the court below as an action at law, we cannot interfere with its finding on questions of fact. Ordinarily this is true. But the construction of the contract was a question of law for the court, reviewable upon error, and not of fact, where all presumptions are in favor of the result reached. The contract is, it seems to us, one of sale, and not of bailment, although there is much language tending to show a "consignment for sale." But taking the instrument as a whole, and reading it in the light of the interpretation put upon it by the parties themselves, we think it clearly contemplates a delivery of the goods to the consignee, with a promise on his part to pay for them at certain fixed prices from any funds which he might see fit to use for that purpose.

It is unnecessary, in view of the conclusions reached, to pass upon appellant's claim of fraud in the transaction, although we may observe in passing that the obscurity of the language used may be attributed to a desire to mystify and perplex, so that, under conditions, appellee might call it a contract of agency or of sale, as the circumstances might seem to demand.

Appellee appeals from an order of court taxing certain costs to it. A decision of this question is uncalled for, in view of the conclusion reached in the former part of this opinion. For error in construing the contract, the judgment of the lower court is reversed.

NOTE.—The principles governing the question as to whether a transaction is a sale or bailment are so fully stated by the court in the principal case that it seems necessary only to call attention to the very recent cases in which those principles have been applied. A miller delivered to a cooper staves and headings to be made into flour barrels and delivered to the miller. The contract spoke of both deliveries as "sales," the staves, etc., being charged to the cooper at certain prices, and he being credited with the price of the barrels delivered. Held, notwithstanding the use of such term, the title to such staves and headings did not pass to the cooper. McCrory v. Hamilton, 39 Ill. App. 490. By the contract sued on, defendant ordered from plaintiff certain goods at named prices, and agreed, in consideration of the exclusive right to sell plaintiff's goods, that he would handle no others. The goods were delivered on credit, and the instrument ended with the clause, "goods not sold this year will be carried on next year's time." Held, that the transaction was a sale and not a bailment, the final clause being in effect an extension of the time of payment. Barnes v. Morse, 38 Ill. App. 274. D, having bought a quantity

of soap of defendant, was induced to take 150 additional cases on consignment, to be accounted for at the rate of $3.25 per case if he succeeded in selling it. D agreed that plaintiff might draw for the soap at 90 days, the draft to be accepted for plaintiff's accommodation, but at maturity should be paid only to the extent of sales by D from the 150 cases. None of the 150 cases was sold by D, and the draft was returned unpaid. The 150 cases were never mingled with D's general stock. Held, that title to the soap remained in plaintiff as against attaching creditors of D. Colorado Soap Co. v. Burns (Colo. App.), 29 Pac. Rep. 915. Goods were consigned to defendants, to be paid for when sold at the prices invoiced, and such as were not sold were to be returned. No time for the return was fixed. Defendants kept the goods for more than three years without offering to return them, and accepted itemized accounts of them, without objection. Held, that defendants were liable for the goods consigned as upon an absolute sale. House v. Beak (Ill. Sup.), 30 N. E. Rep. 1065. In an action to recover for lumber which H had assigned to plaintiffs, and which it was alleged defendants had converted, it appeared that H had agreed to build two boats for defendants, the title to which, if completed, was to remain in H, and defendants were only obliged, under the contract, to take them on inspection and approval. Subsequent to the contract, H ordered the lumber in suit from defendants, which was sent, and also shortly afterwards a bill charging the lumber to H, as on a sale. There was evidence that, prior to these transactions, H had paid cash for lumber obtained from defendants, and that, in a letter to him, defendants' manager agreed to give him credit for such lumber as he bought of defendants. Defendants' evidence was to the effect that they bought lumber for the purpose of building boats for themselves, and furnishing other builders along their canals, and that H was not a purchaser, but a bailee, of the lumber; the agreement being that the price of what H had was to be deducted from the contract price of the boats when completed. Held, that the question whether the transaction was a bailment or a sale was properly submitted to the jury. Crosby v. President, etc., of Delaware & H. Canal Co. (Sup.), 21 N. Y. S. 83, 66 Hun, 628. A contract to receive goods on consignment, to be sold as the agent of another, monthly report of sales and of goods on hand to be made, the goods to remain as the property of the consignor until paid for by the consignee, and all proceeds of sale to belong to the consignor until the invoice is paid, which is to be done for each article as soon as sale of it is made, and with no provision whatever for the acquisition of title to the goods by the consignee, is a contract of bailment, notwithstanding it provides that the compensation of such consignee shall be whatever he shall receive, upon sale of such goods, over the price named in the contract; a further stipulation being that on failure of the consignee to sell in a reasonable time, or on his failure to comply with any condition of the contract, then the agency shall terminate, at the option of the consignor, and goods remaining unsold are to be subject to his order free from all charges. National Bank v. Goodyear (Ga.), 16 S. E. Rep. 962. That the invoices which accompanied the consigned goods said they were sold, some of them stating, "terms contract;" others, "terms contract," and "terms spot cash;" others, "terms when sold;" and one "terms . . .," would not necessarily negative the theory that all the goods were merely consigned, and none of them sold to the consignee. National Bank v. Goodyear (Ga.), 16 S. E. Rep. 962. S leased to M land, and personal property thereon, consisting of live stock and farming implements, of the agreed value of $23,331. It was provided "that when said M shall pay to said S the sum of $23,331, with interest thereon at the rate of ten per cent. per annum, together with the rents above specified, and all sums which S may advance to or for said M, with interest thereon, then all the above property shall be conveyed to him, the said M, together with all increase thereof. Until such payment such property shall be and remain the property of S, together with the increase thereof, and, should any of said property be sold by consent of S, the proceeds shall be applied upon the above indebtedness." Held, that there was no conditional sale, but an agreement to sell at the election of M; that the relation of the parties with respect to said property was that of bailor and bailee only; and that the property, before payment by M, could not be taken on execution to satisfy judgments against him. McClelland v. Scroggin (Neb.), 53 N. W. Rep. 469, 35 Neb. 536. A consignment of goods to the "care" of another, to be shipped to a foreign country, and there sold to the best advantage; any loss resulting from sale below the invoice price to be borne by consignors, and profits in excess thereof to be equally divided; consignee to bear expenses of shipment, and to return free of charge any goods not sold,—is a bailment, and the bailee is not absolutely liable for loss by inevitable accident. Sturm v. Boker, 14 S. C. Rep. 99, 150 U. S. 312. In an action for conversion of lumber it appeared that defendant, a canal company, contracted for boats, and, on the request of the builders, sent lumber for their construction, together with an itemized bill for it. The builders became insolvent, and transferred the lumber to plaintiff, a creditor, and defendant seized it. There was evidence that on former contracts for boats the builders paid for lumber when received from defendant, but that, for several years past, the price of the lumber furnished had been deducted from the price of the boats when completed. Defendant's paymaster testified that he sent the bill merely as a memorandum of the amount of lumber and the sum to be deducted from the price of the boat when defendant settled. Other boat builders testified that defendant had furnished them lumber on the same terms. Held, that the question whether the transaction was a bailment or a sale was properly left to the jury. Crosby v. President, etc., of Delaware & H. Canal Co. (N. Y. App.), 36 N. E. Rep. 332, 141 N. Y. 589. A transaction whereby a warehouseman receives wheat, and mixes it in his warehouse, and is to retain or dispose of the same on his own account, as he pleases, and on presentation of the receipt therefor is to pay the market price thereof, or return the same or other wheat instead, is a sale. Gibb v. Townsend, 9 Ohio Cir. Ct. Rep. 409. A contract between manufacturer and merchant provided that the former should deliver goods to the latter, as ordered; that the latter should give his notes for the full value of the goods, and should sell them for cash or notes, all of the cash and notes to be turned over on their receipt to the manufacturer; and that the sales were to be on commission, to consist of the difference between the buying and the selling prices of the goods. Held, that the transaction was a sale. Peoria Manufg. Co. v. Lyons, 38 N. E. Rep. 661, 153 Ill. 427. A contract to deliver a certain quantity of ores to a smelting company for reduction to a marketable condition, for the benefit of the owner of the ores, after compensating the smelting company for the labor and expense of smelting, is not a contract for the sale of the ores. Patrick v. Colorado Smelt-

ing Co. (Colo. Sup.), 38 Pac. Rep. 236. When the identical thing delivered is to be restored, in the same or an altered form, the contract is one of bailment, and the title to the property is not changed; but when there is no obligation to restore the specific article and the receiver is at liberty to return another thing of equal value, or the money value, he becomes a debtor, to make a return, and the title to the property is changed. It is a sale. Westphal v. Sipe, 62 Ill. App. 111. A contract between J and W recited that J thereby let, leased and demised to W a span of horses, harness, and wagon, worth $400, for three months; that W was to keep the property carefully, and use it so as not to injure it or destroy its value, and if he neglected or refused so to do, on 10 days' notice of his intention thereof, J might terminate the lease; that, in consideration of the lease, W agreed to pay J $133.33 each month during the term; and that, if he fully paid such amounts, then J should execute to him a bill of sale of the property, and such rentals should be applied as payments of the purchase money, and, until the whole of such sum was fully paid, the title should remain in J. Held, that such contract was one of bailment, and not of sale, though there was no stipulation for return of the property on the expiration of the term of the lease. Jones. v. Wands, 1 Pa. Super. Ct. 269, 38 W. N. C. 173.

BOOK REVIEWS.

ELLIOTT ON RAILROADS.

As the authors of this work say in their preface "a treatise on the law of railroads necessarily covers a wide field, for the relations in which railroad companies must be considered are manifold and diverse." In accordance with this idea these four large volumes covering the entire subject of railroad companies have been admirably planned. The two first volumes treat of the corporation, its promotion, formation, legal status, charters, franchises, stock, subscriptions, calls and assessments, stockholders, by-laws, corporate representatives, directors, executive and ministerial officers, dividends, consolidation, contracts, real estate, leases, railroad securities, foreclosure, sale and reorganization, receivers, receivers' certificates, insolvency, removal of causes, governmental control, State railroad commissioners, penal offenses by and against railroad companies, taxation of railroad property, local assessments, land grants, public aid, municipal aid bonds. Vol. 3 treats of the location, construction and operation of railroads, and within this, the acquisition of rights of way, appropriation under eminent domain, compensation and procedure in appropriation cases, railroads in streets, crossings, injuries at crossings, duty to fence, fires set by railway companies, injuries to trespassers, licensees and to employees, fellow-servants, employers' liability acts, relief departments and hospitals. Volume 4 is devoted to the subject of railroads as carriers, and within this, delivery and acceptance, bills of lading, connecting carriers, duties of common carriers, contracts limiting liability, carriers of live stock, freight charges and demurrage, railroads as carriers of passengers, tickets, fares and passes, sleeping car companies, injuries to passengers, baggage, the interstate commerce act. From this statement may readily be seen the comprehensive character of the work and the fact that the authors have discussed many matters not ordinarily considered in text books. Though good treatises on the subject of railroad companies are not wanting, it may be said that the law of railroads has strikingly developed and greatly expanded within the last few years, and that the present volume will probably better answer modern requirements than older treatises. Of the manner in which this treatise has been prepared it is perhaps unnecessary to say more than that the name of the author is the best guarantee of merit. Judge Elliott was for many years a member of the Indiana Supreme Court retiring from that bench with a high reputation as a jurist. In conjunction with his son Wm. F. Elliott, who shares with him authorship in this work and who is known as an able painstaking lawyer, he has written a number of treatises which are well and favorably known. An extended examination of the text and citations of the present work justifies us in the statement that it is in every respect worthy of indorsement. We have no doubt it will attain a high position in legal literature. As before stated it is in four volumes, each over eight hundred pages. It has a complete table of cases, a good index, is beautifully printed and bound, and is published by Bowen-Merrill Company, Indianapolis.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions, and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.

1. ACCIDENT INSURANCE — Disease Contributing to Death. — Under a policy of accident insurance which provides that it shall not extend to nor cover accidental injuries or death "resulting from or caused, di-

rectly or indirectly, wholly or in part, by disease in any form," there can be no recovery for the death of the insured if he had a disease but for which death would not have resulted from the accident; and, where the insured had a diseased heart, it was error to give an instruction allowing the jury to find for the plaintiffs if they believed the accident was sufficient to cause the death of a man with a diseased heart, although insufficient to kill one with a normally healthy heart.—COMMERCIAL TRAVELERS' MUT. ACC. ASSN. OF AMERICA v. FULTON, U. S. C. C. of App., Second Circuit, 79 Fed. Rep. 423.

2. ACTION—Debt Due an Estate.—Where an administrator refuses to bring an action on a claim due the estate, the heirs or creditors may maintain an action thereon in the circuit court, making the administrator and all others interested parties.—TROTTER v. MUTUAL RESERVE FUND LIFE ASSN., S. Dak., 70 N. W. Rep. 843.

3. ADMINISTRATION—Rights of Widow.—A widow, by renouncing right to administer when it is supposed her husband died intestate, is not, on discovery of will, and renunciation of right by executor, deprived of her right to administration *cum testamento annexo*, and to notice of grant of letters, as provided in Code, art. 93, §§ 31, 33, 34.—BRODIE v. MITCHELL, Md., 37 Atl. Rep. 169.

4. ADMINISTRATION — Sale of Real Estate by Executors.—A sale of real estate of a testator by the executors under a power contained in the will passes no title unless confirmed by the court (Code Civ. Proc. § 1561), except where the will devises the property in trust, and vests the legal title in the executors as trustees.—BENNALACK v. RICHARDS, Cal., 48 Pac. Rep. 622.

5. APPEAL — Dismissal on Appellant's Motion. — An appellant cannot of right dismiss his own appeal; and, when an appeal is dismissed on his motion, he is not entitled, in the absence of special equitable considerations, to have the order expressed to be without prejudice; but where an appeal from an interlocutory order granting a preliminary injunction was so dismissed, the order may state the fact that the dismissal was before any hearing on the merits. — DONALLAN v. TANNAGE PATENT CO., U. S. C. C. of App., First Circuit, 79 Fed. Rep. 385.

6. ATTACHMENTS—Priorities—Interpleaders. — Where junior attaching creditors file interpleas, claiming priority of lien, in the action under which the first attachment was levied, such interpleas are to be treated as in the nature of a collateral attack; and the interpleaders cannot defeat the prior attachment by showing that the claim sued on was not yet due, or that the debt, which was alleged in the petition to be for goods sold and delivered, was in fact evidenced by promissory notes,—there being no charge of fraud, and the justice of the plaintiff's claim being clearly established. — STANDARD IMPLEMENT CO. v. LANSING WAGON WORKS, Kan., 48 Pac. Rep. 638.

7. ATTORNEY—Disbarment. — Upon a proceeding for the disbarment of an attorney, the fact that some of the charges against him of professional misconduct are such as to involve also liability to a criminal prosecution does not entitle the respondent to a suspension of proceedings until he has had the opportunity for a jury trial upon such charges.—ROCHESTER BAR ASSN. v. DORTHY, N. Y., 46 N. E. Rep. 835.

8. BANKS—Death of Depositor.—A depositor, in bank, of money subject to order, having died without demand therefor, and the bank having paid the amount of the deposit on demand of the depositor's heir, but refused to pay more, the heir has no cause of action, though previous to the demand, which was several years after the death of the depositor, the heir had no knowledge of the deposit, and the banker volunteered no information, but, with knowledge of her ignorance, accepted her check on another bank in payment of a claim against her as heir of the depositor.—HAMILTON v. TONER, Ind., 46 N. E. Rep. 921.

9. BENEVOLENT ASSOCIATION — Insurance — Assignment of Certificates. — Laws 1887, ch. 1, relating to mutual life insurance companies, provides (section 14) that any member may direct the amount to be paid to a person named, other than the beneficiary named in the certificate: Held, that one who effects insurance on his own life in a company organized under such chapter may assign the certificate to any person, whether he have an insurable interest or not, without any reference to the beneficiaries named in it.—STRIKE v. WISCONSIN ODD FELLOWS MUT. LIFE INS. CO., Wis., 70 N. W. Rep. 819.

10. BILLS AND NOTES—Negotiability.—The provision for costs in a note for a certain sum with attorney's fees and "other costs, in case the holder is obliged to enforce payment at law," renders the note non-negotiable, under the statute. — JOHNSON v. SCHAR, S. Dak., 70 N. W. Rep. 838.

11. BONA FIDE PURCHASER — Notice. — One who purchases land with notice of an adjoining landowner's right to drain his lands through a ditch thereon takes it free from such right, if his grantor had no notice of such right, or of facts to put him on inquiry.—BUCK v. FOSTER, Ind., 46 N. E. Rep. 920.

12. CARRIERS—Negligence—Limiting Liability.—Railway companies may, as private carriers, require exemption from liability for negligence as a condition to the obligation to carry express matter for express companies. — PITTSBURGH, C., C. & St. L. Ry. Co. v. MAHONY, Ind., 46 N. E. Rep. 917.

13. CARRIERS OF GOODS—Limiting Liability.—A stipulation in an express bill of lading, that the express company should not be liable for loss or damage unless demand therefor should be made within 30 days from date of bill of lading, is unreasonable and void, where the express company instructs its agents not to return undelivered packages until the expiration of 30 days from their arrival at their destination.—DIXIE CIGAR CO. v. SOUTHERN EXP. CO., N. Car., 27 S. E. Rep. 78.

14. CARRIERS OF GOODS — Live-Stock Shipments.—A carrier is liable for injury to animals shipped, from a defect in the car, which a reasonably careful inspection by an experienced person would have disclosed, but which was not obvious or such as would ordinarily be discovered by an inexperienced person, notwithstanding a stipulation that the shipper examine the car, and assume the risk of its suitableness, unless he accepted it with full knowledge of the defect.—LEONARD v. WHITCOMB, Wis., 70 N. W. Rep. 817.

15. CARRIERS OF PASSENGERS—Injury — Contributory Negligence.—The occurrence of a "lurch" or "jerk" of a street car, of sufficient violence to throw off the car a passenger who had notified the conductor of her desire to get off at Fifth street, and who, after the conductor called out "Fifth street," had arisen, and gone to the rear door, in preparation for alighting, justifies an inference of some breach of the duty owed to her by the carrier, and falls within the maxim, "*res ipsa loquitur*." — CONSOLIDATED TRACTION CO. v. THALHEIMER, N. J., 37 Atl. Rep. 132.

16. CARRIERS OF PASSENGERS — Negroes — Sleeping Car.—A sleeping car company which sells a ticket on a certain sleeper, from one place to another, to one having a railroad ticket between such places, undertakes to furnish him a berth in that or another sleeper, if the railroad company haul it; so that it, equally with the railroad, is liable, he being excluded therefrom by the railroad company's employees without being furnished a like conveyance, though by its arrangement with the railroad company the latter had charge of the car, and the exclusive right to determine who should ride therein. — PULLMAN PALACE-CAR CO. v. CAIN, Tex., 40 S. W. Rep. 220.

17. CONSTITUTIONAL LAW. — A new constitution of a State, as the supreme law, supersedes all laws, existing when the constitution takes effect, in conflict with its provisions, if it appears that it was intended to have a present binding and operating force upon the matter or thing in question.—PEOPLE v. COMPTROLLER OF CITY OF BROOKLYN, N. Y., 46 N. E. Rep. 852.

18. CONSTITUTIONAL LAW—Classification of Cities and Towns. — The Missouri statute of March 18, 1893, concerning sewers and drains "for cities in the State having a special charter which now or hereafter contains more than 2,000 and less than 30,000 inhabitants," and for such cities of the third and fourth class as may by a vote of the people adopt the act, violates section 7, art. 9, Const. Mo., which provides for the division of the towns and cities of the State into four classes, and declares that the powers of each class shall be defined by general laws.—WARD V. ROBERT J. BOYD PAVING & CONTRACTING CO., U. S. C. C., W. D. (Mo.), W. D., 79 Fed. Rep. 390.

19. CONTEMPT—Disobedience of Erroneous Order.—A proceeding for contempt, unless used as a coercive remedy to compel the performance of an act to which a suitor is entitled, is a special criminal proceeding, distinct from the cause in which it may arise, and the reversal of an order in such cause does not affect proceedings for contempt in disobeying it while in force. —STATE V. NATHANS, S. Car., 27 S. E. Rep. 52.

20. CONTRACTS—Rescission—Mistake.—Where defendant sold plaintiff trees standing on a certain tract of land, and there was a mutual mistake as to the boundaries of such tract, plaintiff was not entitled to a rescission of the entire contract, but to an allowance *pro rata* for the trees on the land which proved not to be defendant's. — HAMILTON V. MCALLISTER, S. Car., 27 S. E. Rep. 63.

21. CORPORATION—Bonds—Signature.—It makes no difference in what form an obligor signs a bond, if it appears that the purpose was to bind himself. And where the name of a corporation, the principal in a bond, appeared in full in the body of the bond, and its seal was impressed opposite the attestation clause, between the obligatory part and the condition, and at the close of the whole instrument the names of the president and secretary were signed, this being its customary method of executing sealed instruments, it is binding; and the surety cannot complain that the bond was not executed by the principal, especially where it recognized the signature as sufficient by signing right below it.—UNION GUARANTY & TRUST CO. V. ROBINSON, U. S. C. C. of App., Eighth Circuit, 79 Fed. Rep. 420.

22. CORPORATIONS—Contracts of Officers.—An architect cannot recover for services rendered a town-site corporation in drawing plans for a new building at the instance of the president, without other evidence of the latter's authority to make the contract than the fact that he had previously employed plaintiff to remodel a building belonging to the corporation.—MATHIAS V. WHITE SULPHUR SPRINGS ASSN., Mont., 48 Pac. Rep. 624.

23. CORPORATIONS—Powers of Officers.—The corporate powers of a corporation being vested in its board of directors by the statute (Comp. Laws, § 2926), its officers have no power to bind it by contracts not authorized by the directors.—DES MOINES MANUFACTURING & SUPPLY CO. V. TILFORD MILLING CO., S. Dak., 70 N. W. Rep. 839.

24. CORPORATIONS — Stock—Transfer.—An owner of stock in a corporation for profit, created under the laws of this State, in the absence of a by-law to the contrary, has absolute power of disposition over the same, and may dispose of it by sale or gift at his pleasure. If the sale or gift is made in good faith; and the shares sold or donated are transferred on the books of the corporation to the purchaser or donee, the transferror does not remain an equitable owner thereof, or thereafter continue liable to assessment, under the statute of this State, for the payment of future corporate debts, although at the time of the sale or donation the corporation and transferee were both insolvent, and the purpose of the former owner, in disposing of the stock, was to escape such future liability.—PETER V. UNION MANUFG. CO., Ohio, 46 N. E. Rep. 894.

25. CORPORATION—Venue—Suit.—The mere payment of office rent by a corporation in a particular county for the sole purpose of fixing the venue of suits on notes made to it, and indorsed to a foreign bank (the ostensible agent residing elsewhere), will not prevent the maker of one of such notes, in a suit against him and the indorser, in that county, from interposing a plea of privilege to be sued in another county, where he resides.—KALAMAZOO NAT. BANK V. STEPHENS, Tex., 40 S. W. Rep. 143.

26. COSTS—Judgment—Retaxation.—A judgment for "all his costs and charges in said action laid out and expended, taxed at $——," is for only such as are authorized by law; and, more being taxed, they may be retaxed after affirmance of original judgment.—WILSON V. JENKINS, Ind., 46 N. E. Rep. 889.

27. COUNTIES—Garnishment — Equitable Lien.—The question whether one furnishing material to a contractor for a county building is entitled to an equitable lien on the public funds raised for such building, because the building is not subject to mechanic's lien, does not arise on a garnishment of the county by the material man, an answer that the contract price was not yet due, and a denial of such answer.—HERRING-HALL-MARVIN CO. V. BEXAR COUNTY, Tex., 40 S. W. Rep. 145.

28. CRIMINAL EVIDENCE—Homicide—Dying Declarations.—Declarations made in expectation of impending death are not rendered inadmissible by the fact that deceased lived for five months after making them. —STATE V. CRAINE, N. Car., 27 S. E. Rep. 72.

29. CRIMINAL LAW—Cruelty to Animals.—It is no defense to an indictment for cruelty to animals, under Code, § 2490, that the chickens killed were destroying peas in the garden of defendant's father.—STATE V. NEAL, N. Car., 27 S. E. Rep. 81.

30. CRIMINAL LAW—Former Conviction—Fraud.—On a prosecution for grand larceny defendant cannot plead former conviction, where he was convicted of petit larceny by a justice of the peace without inquiry as to the value of the property, which the justice knew was beyond his jurisdiction, and on defendant's plea of guilty, adopted by him for the purpose of evading a prosecution for grand larceny.—THOMAS V. STATE, Ala., 21 South. Rep. 784.

31. CRIMINAL LAW—Informers.—Where a person told the marshal of police that he thought a policy business was carried on in a certain building, and, in consequence, the police raided the premises, and found there the appliances for such business, and certain persons, whom they arrested, and from some of whom was obtained evidence of the guilt of two, who pleaded guilty and were fined, such person, as informer, was entitled to one-half the fines, under Code, art. 27, § 176, enacting that if any person shall keep a house for selling lottery tickets he shall be subject to a penalty of $1,000, one-half of which shall go to "the informer." —SANNER V. STATE, Md., 37 Atl. Rep. 165.

32. CRIMINAL LAW — Larceny — Possession.—An instruction that if the stolen coin was sent by defendant, two days after the theft, to a bank, where it was found and identified by the owner, the law presumed defendant to be the thief, and the jury should convict, unless she satisfactorily explained her possession, erroneous. —STATE V. MCRAE, N. Car., 27 S. E. Rep. 78.

33. CRIMINAL LAW — Lottery — Constitutionality. — Laws 1894, ch. 310, § 178, declaring that if any one have in his possession any book, list, or slip or records of the numbers drawn in any lottery, or of any lottery tickets or of any money received or to be received from the sale of any lottery tickets, he shall be liable to indictment, provided that this shall not apply to one having possession of such articles for the purpose of procuring or furnishing evidence of violations of the lottery laws, makes possession the offense, without regard to the person's knowledge of what the articles are.—FORD V. STATE, Md., 37 Atl. Rep. 172.

34. DEED — Construction.—A deed conveying land bounded on one side by O street, and lying on both sides of the L road, "including such parts of said L

road as may lie between said parcels of ground whenever O street is opened for travel and said L road is closed," does not attempt to create an estate in fee *in futuro*, but transfers all the estate the grantor has in the roadbed, subject to the easement in the public so long as the road remains open.—BALDWIN v. TRIMBLE, Md., 37 Atl. Rep. 176.

35. DEEDS — Delivery — Attachment. — Where the owner of land agreed to sell, and, without the purchaser's knowledge, caused a deed to the purchaser to be recorded, but did not deliver it till after the land was attached by a creditor of the grantor, such delivery did not convey title as against the attachment. —CROOM v. JEROME HILL COTTON CO., Tex., 40 S. W. Rep. 146.

36. EASEMENT—Right of Way—Prescription.—Where one uses a way over the land of another without permission as a way incident to his own land, and continues to do so with the knowledge of the owner, such use is, of itself, adverse, and evidence of a claim of right; and, where the owner of the servient estate claims that the use was permissive, he has the burden of showing it.—PAVEY v. VANCE, Ohio, 46 N. E. Rep. 898.

37. EQUITY—Jurisdiction.—Equity has jurisdiction of a bill against a corporation which has transferred on its books stock of plaintiff on the production of the certificates and forged powers of attorney, which bill prays for the cancellation of the transfer and the reissue of the stock to plaintiff, or, in the alternative, for payment to him of the value of the stock.—PENNSYLVANIA CO. FOR INSURANCES ON LIVES & GRANTING ANNUITIES v. FRANKLIN FIRE INS. CO., Penn., 37 Atl. Rep. 191.

38. ESTOPPEL — Inconsistent Positions.—A landlord who sues his tenant for the alleged reasonable rental value of the premises occupied, while admitting that a written lease, fixing a higher rental, exists between the parties, cannot raise the objection on the trial that evidence to show a modification of the lease by parol as to the rent reserved is inadmissible under the statute of frauds.—MAUL v. SCHULTZ, Mont., 46 Pac. Rep. 626.

39. ESTOPPEL BY DEED—Homestead.—A recital in a mortgage by a husband and wife, of land not then occupied by them as a residence, that is not their homestead, as well as like representations, estops them to claim that it is their homestead.—SCOTTISH-AMERICAN MORTG. CO. v. SCRIPTURE, Tex., 40 S. W. Rep. 210.

40. EVIDENCE—Admissions.—Admissions of one who was president and principal stockholder and general manager of plaintiff corporation as to his authority were admissible against the corporation.—TEXAS STANDARD COTTON-OIL CO. v. NATIONAL COTTON-OIL CO., Tex., 40 S. W. Rep. 159.

41. EVIDENCE—Deposition.—A party taking a deposition cannot read in evidence incompetent testimony because it was called out on cross-examination; the evidence of the witness, in chief, in relation to the same matter, being excluded.—MCCUTCHEN v. JACKSON, Tex., 40 S. W. Rep. 177.

42. EVIDENCE—Photographs.—In an action for personal injuries, a photograph of the place of the accident, taken two years after the injury, where there was evidence of changes in the situation, where it was material to establish a path as existing two years ago, and where the ground, soon after the injury, was fenced up, was inadmissible, whether introduced as original evidence or as an unauthorized map.—HAMPTON v. NORFOLK & W. R. CO., N. Car., 27 S. E. Rep. 96.

43. EXECUTION SALE.—Execution sale of land described in two parcels will not be set aside because the property was sold as a whole; there having been no preparation or request of the sheriff, for sale by the parcel.—LENNON v. HEINDEL, N. J., 37 Atl. Rep. 147.

44. FEDERAL COURTS—Certiorari.—The power of the supreme court in *certiorari* extends to every case pending in the circuit courts of appeal, and may be exercised at any time during such pendency, if the case is one which would otherwise be finally determined in that court; and, while this power will be sparingly exercised, it is properly exercised where there is a conflict between a circuit court of appeals and the supreme court of the State as to whether a large body of land has been validly annexed to the territory of a city.—FORSYTH v. CITY OF HAMMOND, U. S. S. C., 17 S. C. Rep. 665.

45. FIXTURES—Deeds.—A deed of a sawmill recited the sale of "the following described lands, together with all the mills, machinery, tools, fixtures, appurtenances pertaining to the same." The mill site had been long in use for such purpose, and it was the custom to regard all machinery attached to the building thereon as part of the realty. The tax books did not show that the mills and machinery were assessed as personal property. The machinery and necessary appliances could be removed without injury to them or the land: Held, that the mill and the planer and machinery attached thereto, as distinguished from the land, were real estate, and the subject of a vendor's lien.—BEMIS v. FIRST NAT. BANK, Ark., 40 S. W. Rep. 127.

46. FORCIBLE ENTRY AND DETAINER — Lease.—Under Comp. Laws, § 6073, providing that the action of forcible entry and detainer may be maintained "when a lessee fails to pay his rent for three days after the same shall be due," a clause of re-entry need not be contained in the lease to authorize the action.—DAKOTA HOT SPRINGS CO. v. YOUNG, S. Dak., 70 N. W. Rep. 842.

47. FRAUDS, STATUTE OF — Performance within a Year.—A parol hiring at $1,800 a year, "and, if we can see our way clear next year," such salary to be increased, is not a contract which by its terms is not to be performed within a year, within the statute of frauds, though the employee worked under it for 18 months, no new arrangement being made at the end of the year.—WOODALL v. DAVIS-CRESWELL MANUFG. CO., Colo., 48 Pac. Rep. 670.

48. FRAUDULENT CONVEYANCES.—Where children pay their father full value for an equity of redemption, amounting to $300, in land worth $2,000, the fact that they also agree to support him in consideration of the transfer of the homestead, consisting of other land, and such small equity, does not render the conveyance void as to creditors.—TORREY CEDAR CO. v. EUL, Wis., 70 N. W. Rep. 823.

49. FRAUDULENT CONVEYANCE.—Where B, in anticipation of a divorce, on buying land, with intent to defraud his wife, has title put in the name of M, who is represented to the commercial world as the owner thereof, persons who give credit to M on the faith of his ownership of the property can hold it against B, though he had actual possession of it, and it was conveyed to him by M before they attached it for M's debts.—BICCOCHI v. CASEY & SWASEY CO., Tex., 40 S. W. Rep. 209.

50. FRAUDULENT CONVEYANCE — Parties.—A conveyance being made and accepted for the purpose of hindering creditors, the grantee cannot hold the property against the creditors, though, after the conveyance, he made advances to the grantor, on agreement that he be reimbursed out of the property.—HEAD v. HARDING, Ill., 46 N. E. Rep. 890.

51. GARNISHMENT—Release by Undertaking.—Where garnished funds are released by an undertaking given for that purpose, the sureties cannot question its validity on the ground that no statute authorizes such release.—SCHRADSKY v. DUNKLEE, Colo., 48 Pac. Rep. 666.

52. GARNISHMENT IN FOREIGN COURT.—Where a citizen of Texas has been sued in a foreign court by garnishment, a judgment rendered against the garnishee is no defense to an action by the citizen against the garnishee, unless the debt due from the garnishee was payable within the jurisdictional boundaries of the foreign court, or there was personal service of sum-

mons on the citizen of Texas.—T. & H. SMITH & CO. v. TABER, Tex., 40 S. W. Rep. 156.

53. HABEAS CORPUS—Jurisdiction of Federal Courts.—Where the requisite citizenship appears upon the face of a bill in a federal court, the jurisdiction of the court cannot, in a collateral proceeding by *habeas corpus* by one who was not a party to the bill, be attacked by evidence dehors the record.—EX PARTE LENNON, U. S. S. C., 17 S. C. Rep. 658.

54. HOMESTEAD — Contiguous Tracts.—Two tracts which corner, and on one of which the owner has his home, may be claimed as a homestead, where they together do not exceed the statutory area and value, and the owner has no other land.—CLEMENTS v. CRAWFORD COUNTY BANK, Ark., 40 S. W. Rep. 182.

55. HUSBAND AND WIFE.—A wife cannot join with her husband, or sue in her own name for the care, attendance upon, and nursing of a sick boarder of her husband, in his household, though the services were her own exclusively.—GARRETSON v. APPLETON, N. J., 37 Atl. Rep. 150.

56. HUSBAND AND WIFE—Actions — Desertion.—Gen. St. 1894, § 5165, provides that "when a husband has deserted his family the wife may prosecute or defend in his name any action which he might have prosecuted or defended, and shall have the same powers and rights therein as he might have had:" Held, that this law is constitutional.—ALLEN v. MINNESOTA LOAN & TRUST CO., Minn., 70 N. W. Rep. 800.

57. HUSBAND AND WIFE—Mortgage of Wife's Chattels—Ratification.—Ratification by wife of a chattel mortgage on her separate property, executed only by the husband, is not shown by evidence that the wife gave to the husband money which he used in paying one month's interest, without showing the wife's knowledge of his purpose to so use it, or her intent to thereby ratify the mortgage, which she had persistently refused to sign or recognize.—PRALL v. RICHARDS, Colo., 48 Pac. Rep. 668.

58. HUSBAND AND WIFE — Wife's Interest in Homestead.—Under the California laws the wife has an interest in the homestead which requires a consideration for her agreement to convey or incumber it, and therefore her mortgage of the homestead to secure an antecedent debt of the husband is not binding on her.—CALIFORNIA FRUIT TRANSP. CO. v. ANDERSON, U. S. C. C., N. D. (Cal.), 79 Fed. Rep. 404.

59. INJUNCTION — Practice.—Though rule to show cause why injunction should not issue may be granted, in emergency cases, on bill not sworn to as to all the facts, and supported by affidavits which do not contain strictly legal evidence as to some of the facts, complainant cannot, on return of the rule, stand on them alone.—THOMPSON v. OCEAN CITY R. CO., N. J., 37 Atl. Rep. 129.

60. INSURANCE — Certificate of Authority.—Burn's Rev. St. 1894, § 4915 (Rev. St. 1881, § 3765), forbidding an agent of "any insurance company incorporated by any other State" than Indiana to transact insurance business without a certificate of authority, applies only to incorporated companies.—STATE v. CAMPBELL, Ind., 46 N. E. Rep. 944.

61. INSURANCE — Construction of Policy.—A carrier whose bills of lading for cotton exempted it from liability for loss by fire placed the cotton in the yards of a compress company, where it was destroyed by accidental fire: Held, that the carrier was entitled to recover on a policy insuring it against loss by fire on cotton for which it had issued bills of lading, "and for which they (it) shall be liable," while in compress yards; the words quoted referring to liability in general.—GERMANIA INS. CO. v. ANDERSON, Tex., 40 N. W. Rep. 200.

62. INSURANCE — Ownership of Premises.—Held, the condition avoiding the policy, "if the subject of insurance be a building on ground not owned by the insured," was not broken, as long as some part of the building stood on land owned by the insured in fee-simple.—HAIDER v. ST. PAUL FIRE & MARINE INS. CO., Minn., 70 N. W. Rep. 805.

63. INSURANCE — Standard Policy.—A fire insurance policy issued under Laws 1891, ch. 195 (Standard Policy Act), which was adjudged unconstitutional after the issuance of the policy, should be construed as a policy formulated by the parties, not as one prescribed by the State.—FLATLEY v. PHOENIX INS. CO., Wis., 70 N. W. Rep. 829.

64. INSURANCE—Warranty—Title.—Until the death of the husband, leaving her surviving, the wife has no claim on realty owned by him in fee and conveyed by him alone after the marriage; and hence the husband's grantee becomes "absolute owner" of the property, within the meaning of a question in an application for insurance thereon, the answer to which was made a warranty.—OHIO FARMERS' INS. CO. v. BEVIS, Ind., 46 N. E. Rep. 928.

65. INTERVENTION.—In a suit by the receiver of a corporation against a bank to recover certain securities, a claim of an adverse interest in a note among the securities, which claimant alleged he had been induced to execute to the corporation on fraudulent representations, and which he had rescinded before the receiver was appointed, and had demanded a surrender of, entitled claimants to intervene, within Comp. Laws, § 4886, providing that any person may intervene who has an interest in the matter in litigation, or an adverse interest against both parties.—TAYLOR v. BANK OF VOLGA, S. Dak., 70 N. W. Rep. 834.

66. INTOXICATING LIQUORS—Insufficiency of Bond.—Under 3 How. Ann. St. § 2283d, which provides that, if a person required to pay a tax as a liquor dealer shall engage in the business "without having made, executed, and delivered the bond required by this act, such person shall be deemed guilty of a misdemeanor," where the bond is insufficient by reason of one of the sureties being disqualified, though it was given in good faith, is sufficient in form and has been approved by the municipal authorities, he is subject to criminal prosecution.—WOLCOTT v. BURLINGAME, Mich., 70 N. W. Rep. 831.

67. INTOXICATING LIQUOR—Retrospectiveness.—Acts 1895, p. 248, § 4 (Nicholson Law), requiring saloons to be located on a ground floor, and so arranged that the interior may be seen from the street, and forbidding the obstruction of the view of the room during hours and days when sales are prohibited, is not retrospective as to persons doing business under licenses issued prior to its taking effect, since it applies only to the conduct of the business, and to such conduct only after it went into effect.—NELSON v. STATE, Ind., 46 N. E. Rep. 941.

68. JUDGMENTS—Collateral Attack.—One whose land was sold on execution to satisfy a judgment of the circuit court assessing benefits in a condemnation proceeding could not, in an action to quiet title, attack the title of the purchaser on the ground of irregularities in said proceeding not going to the jurisdiction.—LOVETT v. RUSSELL, Mo., 40 S. W. Rep. 123.

69. LANDLORD AND TENANT — Lease — Modification.—The lessee of a mine notified the lessor that he would be compelled to shut down the mine if he had to continue to pay the royalty named in the lease, because of extra difficulty in mining. It was then agreed, in order to prevent a forfeiture of the lease, and to secure the lessor a royalty from the mine, that a less royalty should be paid, and the reduced royalty was paid as agreed for several years: Held, that there was a consideration for the modification.—SARGENT v. ROBERTSON, Ind., 46 N. E. Rep. 925.

70. LANDLORD AND TENANT—Negligence.—A landlord who, at the request of his tenant, undertakes to put on a new roof, is liable for injury to the tenant from the negligent conduct of the work, the same as though he was bound by the lease to do the work.—WERTHEIMER v. SAUNDERS, Wis., 70 N. W. Rep. 824.

71. LANDLORD AND TENANT—Tenancy.—Where a lease of a store building was for one year and as much

longer as the lessees should remain in business, and the lessees held over after the expiration of the year, a tenancy from year to year was not created, and they could terminate the lease at any time.—HARTY v. HARRIS, N. Car., 27 S. E. Rep. 90.

72. LIMITATIONS — Railroad Receivers.—Suit commenced against the H. & T. C. "Railway" Co. arrests the running of limitations in favor of the H. & T. C. "Railroad" Co., which purchased the franchises of the first-named corporation, and permitted its line to be operated under the former name, said "railway" company practically passing out of existence.—HOUSTON & T. C. RY. CO. v. MCFADDEN, Tex., 40 S. W. Rep. 216.

73. LIMITATION OF ACTIONS — Trustee of Insolvent Corporation.—Under section 91 of the Code of Procedure, an action by the receiver of a corporation against one of its trustees to compel him to account for property of the corporation, wasted and lost through his misconduct, is barred at the expiration of six years from the commission of the wrongful acts; the proviso of subdivision 6, that the cause of action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts, does not apply, since the cause of action resting upon the liability of the trustee to make good the loss is cognizable as well at law as in equity.—MASON v. HENRY, N. Y., 46 N. E. Rep. 837.

74. MARRIED WOMEN—Suretyship.—Under Act June 8, 1893, § 2 (Purd. Dig. p. 1299, pl. 24), declaring that a married woman may not become accommodation indorser, maker, guarantor, or surety for another, a married woman is incapacitated to enter into one of the prohibited contracts, and hence she cannot bind herself as surety, though the debt be contracted by her principal for the benefit of her separate estate.—WILTBANK v. TOBLER, Penn., 37 Atl. Rep. 188.

75. MASTER AND SERVANT—Assumption of Risk.—Evidence considered, and held that, upon the most favorable view of it for the plaintiff, it conclusively shows that he voluntarily and knowingly assumed the risk of using a certain box, handed to him by the defendant's superintendent, to stand upon in order to reach a wire which they were repairing.—SOUTAR v. MINNEAPOLIS INTERNATIONAL ELECTRIC CO., Minn., 70 N. W. Rep. 796.

76. MASTER AND SERVANT — Contract of Employment —Statute of Frauds.—A written contract whereby a firm hired an employee for five years being within the statute of frauds, the joint liability of the partners for the payment of the agreed wages cannot be changed by parol evidence of a subsequent oral agreement that each partner should pay one-half only.—HANSON v. GUNDERSON, Wis., 70 N. W. Rep. 827.

77. MASTER AND SERVANT — Negligence.—Where it was customary for the head brakeman on a freight train to ride in the cab of the engine when his duties did not require him to be upon the cars, which was not objected to nor forbidden by any rule of the company, the fact that he was so riding at the time the train was wrecked, by reason of the defective condition of the track, and he was killed, did not show that he was not at his proper post of duty, or that he was guilty of contributory negligence.—TEXAS & P. RY. CO. v. MAGRILL, Tex., 40 S. W. Rep. 188.

78. MECHANICS' LIENS — Contractor — Submaterialman.—One who agrees to sell machinery to be delivered free on board cars at his factory, and set up by the buyer, is not a "contractor" for the furnishing thereof, so as to entitle the person from whom he subsequently buys the machinery, and who delivers it to him, to a mechanic's lien as a "subcontractor," under Burns' Rev. St. 1894, § 7255, but is a material-man.—CAULFIELD v. POLK, Ind., 46 N. E. Rep. 932.

79. MECHANIC'S LIEN—Statement of Claim.—A statement of account of materials furnished, giving the items and prices, and alleging that they were furnished between certain dates, the last of which is within four months of the date of filing, but which fails to give the dates on which the separate items were furnished, is a substantial compliance with Rev. St. 1889, § 6709, requiring the filing of a just and true account on which a mechanic's lien is claimed.—MITCHELL v. PLANING-MILL CO. v. ALLISON, Mo., 40 S. W. Rep. 118.

80. MORTGAGE — Assumption of Debt by Grantee.—A mortgagee may sue at law in his own name to recover the mortgage debt from a grantee of the premises who assumed in his deed to pay said debt.—STARBIRD v. CRANSTON, Colo., 48 Pac. Rep. 652.

81. MORTGAGE — Deed Absolute.—A deed by an administrator, of lands of the estate, to secure loans made to him individually,—he charging himself, as administrator, with the price,—is not, as to the administrator's creditors, a mortgage, since on defeasance the land would not revert to him.—GORRELL v. ALSPAUGH, N. Car., 27 S. E. Rep. 85.

82. MORTGAGE—Deed of Trust — Sale.—Where a creditor, having two deeds of trust on the same property, securing different debts, enforces first the junior lien, he, by proceeding to foreclose the senior lien, opens up the mortgagor's equity of redemption, to the extent, at least, that he has a right to have the sale go on, so that he may get the benefit of anything the property sells for in excess of the debt secured by the senior deed of trust; and the creditor cannot stop the sale by canceling the note evidencing the debt.—COLER v. BARTH, Colo., 48 Pac. Rep. 656.

83. MORTGAGES—Subrogation.—Where the purchaser in a land contract, who had paid the price, deposited the contract with a bank which he owed, and with it an instrument stating that the contract was deposited to secure all indebtedness against him, the instrument created an equitable mortgage of the land described in the contract.—HACKETT v. WATTS, Mo., 40 S. W. Rep. 113.

84. MORTGAGE—Transfer of Property — Parcels.—Where a mortgagor, by recorded deed, conveys part of the tract to one who assumes the entire mortgage debt, and then conveys the balance free from the incumbrance, the first parcel, even in the hands of a subsequent grantee, who agrees only to pay a proportionate part of the debt, is primarily liable for the whole amount; and the mortgagee may first resort thereto, reserving the balance of the tract as a separate fund to satisfy a later indebtedness secured on that part alone.—SKINNER v. HARKER, Colo., 48 Pac. Rep. 648.

85. MORTGAGES—Validity.—A recorded mortgage expressed to cover future advances has priority over subsequent conveyances and incumbrances.—WILLIS v. SANGER, Tex., 40 S. W. Rep. 229.

86. MORTGAGE OF HOMESTEAD — Validity.—Under Const. art. 16, providing that no incumbrance, as against the homestead, shall be valid, except for the purchase money, or improvements thereon, a mortgage on a homestead is not rendered valid though the husband and the wife declare that the premises actually occupied by them are not their homestead.—BUILDING & LOAN ASSN. OF DAKOTA v. GUILLEMENT, Tex., 40 S. W. Rep. 225.

87. MUNICIPAL CORPORATIONS—Streets—Dedication.—Where a town plat lays off land into blocks and lots, with spaces between the blocks that appear to form no part of them or the lots, but indicate spaces for streets and avenues, and the blocks and lots are sold with reference to plat, the presumption is that the spaces between the blocks are dedicated to the public use as streets and avenues.—PORTER v. CARPENTER, Fla., 21 South. Rep. 788.

88. NEGLIGENCE.—An employee in a restaurant picked up a gasoline lamp, which had become improperly ignited, to carry it outside. While proceeding to the door, he was severely burned, and threw the lamp, causing it to explode: Held, that his employer was not liable as for culpable negligence, to a third person injured by such explosion. — DONAHUE v. KELLY, Penn., 37 Atl. Rep. 186.

89. NEGLIGENCE — Independent Contractor.—Where it appeared that defendant advertised balloon ascensions at the park, by a person employed by it, and that a pole used to sustain the balloon while being inflated fell on deceased when the balloon was released, because no warning was given that the poles would fall at such time, and the people were allowed to gather near them, even if the person employed by defendant was an independent contractor, defendant was not relieved of liability.—RICHMOND & M. RY. CO. v. MOORE'S ADMR., Va., 27 S. E. Rep. 70.

90. NEGLIGENCE—Proximate Cause.—If a horse-car driver was negligent in attempting to cross a steam railroad in front of an approaching train, resulting in injury to a passenger who jumped from the car in a reasonable effort to avoid injury from the expected collision, the fact that the negligence of the gateman in lowering the gate between the horses and the car united in producing the result does not absolve the horse-car company from liability.—WASHINGTON & G. R. CO. v. HICKEY, U. S. S. C., 17 S. C. Rep. 661.

91. PARTNERSHIP—Contracts.—In an action on a note, a defense that the note was given in pursuance of an oral contract whereby plaintiff agreed that, if defendant would give his notes for plaintiff's stock of goods, he would assure him credit, and become his partner, and contribute one of the notes, was not objectionable as seeking to vary by parol the terms of the note.—HENRY v. MCCARDELL, Tex., 40 S. W. Rep. 172.

92. PARTNERSHIP — Dissolution — Equitable Relief.—One partner may sue the other in covenant, without an account stated, the partnership articles being under seal, and a covenant or agreement in them being violated, so that there is no necessity for equitable relief.—GUSDORFF v. SCHLEISNER, Md., 37 Atl. Rep. 170.

93. PLEADING — Inconsistent Defenses.—Defendant may join with a defense of rescission for fraud of the contract sued on, and a counterclaim for payments made under the contract, a second counterclaim for damages for breach of the contract by plaintiff; Rev. St. § 2657, permitting him to set forth as many defenses and counterclaims as he may have.—SOUTH MILWAUKEE BOULEVARD HEIGHTS CO. v. HARTE, Wis., 70 N. W. Rep. 821.

94. PLEADING — Service of Summons.—A motion to set aside the service of a summons does not extend the statutory time within which to answer.—GARVIE v. GREENE, S. Dak., 70 N. W. Rep. 847.

95. POWER OF ATTORNEY—Revocation.—The demand by the principal for the return of a written power under which an attorney in fact was acting, and its surrender and withdrawal without any explanatory words or further instructions, must be held to be a revocation of the power.—KELLY v. BRENNAN, N. J., 37 Atl. Rep. 137.

96. PRINCIPAL AND AGENT—Termination.—Mere authority to sell land and collect payments does not authorize the agent, after deed had been given, and purchase-money notes had been sent the vendor, to take new notes in substitution, though the agent erroneously supposed the first notes had miscarried in the mails.—HILL v. BESS, Tex., 40 S. W. Rep. 202.

97. PRINCIPAL AND SURETY—Officers—County Treasurer.—The sureties on a bond conditioned that a county treasurer would, among other things, render just and true accounts, cannot deny the correctness of the accounts rendered by him though they had no notice thereof, and hence are estopped to contend that money which the treasurer reported as on hand was in fact lost before the execution of the bond.—COE v. NASH, Tex., 40 S. W. Rep. 225.

98. RAILROAD COMPANY — Crossings — Signals.—The statute requiring the locomotive bell to be rung or the whistle sounded 80 rods from the place where a railway crosses a traveled road or street does not apply to private farm crossings. But it does not follow that a railway company never, under any circumstances, owes to the adjacent landowner the duty of giving a warning signal that a train is approaching his crossing. The question is to be determined on general legal principles, whether, under all the circumstances, reasonable care required the giving of such a signal.—CZECH v. GREAT NORTHERN RY. CO., Minn., 70 N. W. Rep. 791.

99. RAILROAD COMPANIES—Injury.—Where a statute makes railroad companies liable for death caused by the gross negligence of their servants, a charge which, after defining ordinary negligence, authorizes a recovery in case deceased was killed by the "negligence" of defendant's servants, without anywhere requiring proof of gross negligence, is erroneous.—GULF, W. T. & P. RY. CO. v. LETSCH, Tex., 40 S. W. Rep. 181.

100. RAILROAD COMPANY—Injury to Car Coupler—Assumption of Risk.—One who continues to attempt to couple cars after seeing a rail projecting from the front of the approaching car assumes the risk; so that he cannot recover for injury which he would not have received but for the projection of the rail, though the facts that it was loaded on the car at an angle, instead of parallel, with the sides of the car, and that the floor of the approaching car was lower than that of the other car, which he did not know, combined with the projection to produce the injury.—ELY v. SAN ANTONIO & A. P. RY. CO., Tex., 40 S. W. Rep. 174.

101. RAILROAD COMPANY—Negligent Killing of Dog.—Under Const. art. 17, § 12, and Sand. & H. Dig. § 6849, making railroads "responsible for all damages to property done or caused by the running of trains," a railroad company is liable for the negligent killing of a dog by one of its trains.—ST. LOUIS, S. W. RY. CO. v. STANFIELD, Ark., 40 S. W. Rep. 126.

102. RAILROAD COMPANY—Right of Way in Street.—The granting by a municipal corporation to a railroad company of a right of way along a street does not deprive the public of the right to also use the street as a highway, and the rights of each therein must be exercised with due regard to the rights of the other.—ST. LOUIS, I. M. & S. RY. CO. v. NEELY, Ark., 40 S. W. Rep. 130.

103. RAILROAD COMPANY — Street Railways — Negligence.—The court will not declare, as a matter of law, that a motoneer in charge of a car on an electric street railway, who propels it at the rate of about 12 miles an hour over a street crossing adjacent to a large public school building, when the street is filled with children just leaving school, who fails to ring the bell nearer to the crossing than 150 feet, and who neglects to keep watch of the track ahead of him, is not guilty of gross and wanton negligence.—CONSOLIDATED CITY & C. P. RY. CO. v. CARLSON, Kan., 48 Pac. Rep. 635.

104. RAILROAD MORTGAGES—Priority of Judgment.—A judgment against a railroad company for a death loss occurring in the operation of the road cannot be regarded as a necessary operating expense, and is not entitled to priority of payment over a mortgage upon that ground.—NEW YORK SECURITY & TRUST CO. v. LOUISVILLE, & E. ST. L. C. R. CO., U. S. C. C., D. (Ind.), 79 Fed. Rep. 386.

105. RECEIVERS — Property Subject to Tax Lien.—Where property coming into the hands of a receiver is subject to a lien for taxes, for the enforcement of which no specific remedy is provided by statute, the chancery court of which the receiver is an officer, has jurisdiction, by reason of his possession of the property, to provide payment of the taxes, as a preferred claim, out of the proceeds of the property.—DURYEE v. UNITED STATES CREDIT-SYSTEM CO., N. J., 37 Atl. Rep. 155.

106. SALE—Conditional Sale—Statute of Frauds.—A conditional sale of personal property, by which the title is reversed in the seller until the purchase money is paid, is embraced within the statute and will be void as to creditors and purchasers for a valuable consideration after the expiration of two years' possession on the part of the purchaser, unless such sale be declared in writing, and recorded as provided by the statute.—HUDNALL v. PAINE, Fla., 21 South. Rep. 791.

107. SALE ON CREDIT—Fraud by Buyer.—A purchase of goods, with the intention not to pay for them, is a fraud which will entitle the seller to avoid the sale, though there were no false representations or pretenses.—BUGG v. WERTHEIMER-SCHWARTZ SHOE CO., Ark., 40 S. W. Rep. 134.

108. SPECIFIC PERFORMANCE — Sale of Land—Parol Authority.—Equity will specifically enforce a sale of lands by an agent under parol authorization, where there has been a payment of the purchase money, and a surrender of the possession to the purchasers.—ROVELSKY v. SCHEUER, Ala., 21 South. Rep. 785.

109. STATUTES—Subjects and Titles of Acts.—Where the subject of an amendatory act is not embraced in its title, the fact that the original act was passed before the adoption of the constitution, when the title was of no significance in determining the validity of an act, does not render the amendatory act constitutional.—IN RE SENATE BILL NO. 23, Colo., 48 Pac. Rep. 647.

110. SUNDAY—Filing Garnishment Proceedings.—The filing of a garnishment bond and affidavit in a pending suit on Sunday, the writ not being issued until Monday, is not inhibited by Rev. St. 1895, art. 1180, providing that "no suit shall be commenced," nor "process be issued or served," on Sunday, "except in case of attachment," since not only is it not within the terms of the statute, but, being a species of attachment, is within the exception.—SCHOW v. CITY NAT. BANK OF GATESVILLE, Tex., 40 S. W. Rep. 166.

111. TAXATION OF RAILROAD—Assessment.—In assessing for taxation the real estate of a railroad company within a town, consisting of a portion of its line, with tracks, sidings, stations, etc., the valuation thereof cannot legally be based upon the cost, rentals, and earnings of the whole railroad, but the just and reasonable rule of valuation of such real estate is to fix its value at a sum not exceeding the cost of reproducing it.—PEOPLE v. CLAPP, N. Y., 46 N. E. Rep. 842.

112. TENANTS IN COMMON—Contribution.—A tenant in common made a loan, giving mortgage security on the entire property, and at his direction the mortgagee paid out of the loan a prior mortgage on the property, both supposing the mortgagor was owner: Held, that the mortgagor was entitled to contribution, and to subrogation to the mortgage paid off; and that the second mortgagee succeeded to this right of subrogation. — HAVERFORD LOAN & BUILDING ASSN. OF PHILADELPHIA v. DOUGHERTY, Penn., 37 Atl. Rep. 179.

113. TENANTS IN COMMON — Waste.—A tenant in common may sue his cotenant for waste. Code, § 627.—HINSON v. HINSON, N. Car., 27 S. E. Rep. 80.

114. TRIAL—Instruction.—An instruction which from its form of expression is liable to be construed by the jury as assuming the proof of a material fact in controversy is misleading.—MISSOURI, K. & T. RY. CO. OF TEXAS v. WILLIAMS, Tex., 40 S. W. Rep. 161.

115. TRUST DEED—Preferred Creditors.—A debtor determined to make special provision for particular creditors by a trust deed of part of his property. On consultation with his attorney, he was informed that the effect of such deed would be to destroy his business, and determined, after making such trust deed, to make a general assignment. He made his trust deed, as originally proposed, and shortly thereafter executed the assignment: Held, that the trust deed was not invalidated thereby. — POLLOCK v. SYKES, Miss., 21 South. Rep. 780.

116. TRUST—Resulting Trust.—A promise on the part of a father that, if a verbal lien claimed by his daughter on two certain lots should be released, he would have two other lots conveyed to her, will not establish a trust in such two lots on failure of the father so to convey.—BUNDREN v. LEHR AGRICULTURAL CO., Tex., 40 S. W. Rep. 205.

117. TRUST—Resulting Trust — Payments for Wife.—When the husband and wife both make payments to meet the dues of building association stock standing in the name of the wife, the presumption is that his payments were gifts to her, and a resulting trust in favor of the husband because of his payments will not arise until this presumption is rebutted by evidence sufficient to establish such a trust. — BACON v. DEVINNEY, N. J., 37 Atl. Rep. 144.

118. TRUST — Statute of Frauds. — An agreement, on purchase of land under execution, that the purchaser would hold the land as trustee, subject to reconveyance to the execution debtor on payment of the balance of the judgment, is not void because oral. — BROWN v. JACKSON, Tex., 40 S. W. Rep. 162.

119. USURY.—A landowner obtained a loan, with the proceeds of which a judgment on vendor's lien notes was paid, and the judgment was assigned to the lender, who was subrogated to the rights of plaintiff therein, and the borrower gave a mortgage of the land to secure the loan: Held, that the fact that the loan was usurious did not destroy the force and validity of the judgment; and this although it was intended that the judgment should be extinguished by the loan transaction. — HENNESSY v. CLOUGH, Tex., 40 S. W. Rep. 157.

120. USURY — Commissions. — When one negotiates a loan through a third party with a money lender, and the latter *bona fide* lends the money at a legal rate of interest, the contract is not made usurious merely because the intermediary charges the borrower with a heavy commission; the intermediary having no legal or established connection with the lender, as agent.—BEST v. BRITISH & AMERICAN MORTG. CO., U. S. C. C., E. D. (N. Car.), 79 Fed. Rep. 401.

121. USURY — Compound Interest.—Civ. Code, § 1919, authorizing parties to contract that, on default of prompt payment of interest, it shall become part of the principal, and bear the same rate of interest, inhibits a contract for compound interest at a higher rate than the principal bears, though such interest is to run independently of the principal. — YNDART v. DEN, Cal., 48 Pac. Rep. 618.

122. VENDOR AND PURCHASER—Vendor's Lien.—Where the maker of negotiable vendor's lien notes before their maturity gives the vendor duplicate notes, and a trust deed securing them, on the statement by the vendor that the originals are lost, the vendor's lien of an innocent purchaser for value of the original notes is not lost by the payment of the duplicate notes by the vendee.—DEGENHART v. SHORT, Tex., 40 S. W. Rep. 150.

123. WAREHOUSEMAN — Conversion. — Where a warehouseman receives grain on deposit from the owner, to be mingled with other grain in a common receptacle, from which sales are made, the warehouseman keeping at all times sufficient grain of like kind and quality for the depositor, and ready for delivery to him upon demand, the contract is one of bailment. —BAKER v. BORN, Ind., 46 N. E. Rep. 930.

124. WATER COURSES—Riparian Rights. — The owner of property on the bank of a water course has a right to build barriers and confine the waters to the channel of the stream, but he cannot build and maintain a structure which will change the channel or project the waters against or upon the property of others, in such a way as will result in substantial injury to such property.—PARKER v. CITY OF ATCHISON, Kan., 48 Pac. Rep. 632.

125. WILLS — Rights of Devisees. — D, by the sixth clause of his will, devised certain real estate to "my aunt, C, and my cousins [naming seven persons]; each to take an equal share therein." There was no reference elsewhere in the will to the devisees, or the estate devised to them, though it appeared by evidence outside of the will that they composed one family. The will contained residuary clauses which prevented intestacy in case of lapse: Held, that the devisees took distributively, as tenants in common, and not as a class, with the right of survivorship, and, accordingly that, upon the death of two of the devisees before the testator, the devises to them lapsed. — MOFFETT v ELMENDORF, N. Y., 46 N. E. Rep. 845.